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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 275.

THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN H. GOSSLER ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 21, 1875.

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5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The Delaware Mutual Safety Insurance Company, plaintiff, and John H. Gossler et al., defendants, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the sa d Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixteenth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

G. F. SHEPLEY,
U. S. Circuit Judge, First Judicial Circuit.

Due, sufficient, and legal service of this writ and citation thereunder is hereby acknowledged.

SOHIER & WELCH,
For Defendants in Error.

6 Circuit court of the United States, district of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this fourth day of October, A. D. 1875.

JOHN G. STETSON, *Clerk.*

7 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, b gun and holden at Boston, within and for the district of Massachusetts, on Thurs-

day, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-four—

Before the honorable George F. Shepley, circuit judge.

THE DELAWARE MUTUAL SAFETY INSURANCE Company, a corporation created under and by virtue of the laws of the State of Pennsylvania, and having its principal place of business in Philadelphia, in said State of Pennsylvania, and a citizen of said State of Pennsylvania, plaintiff,

8 *v.*

JOHN H. GOSSLER, OF HAMBURG, IN Germany, John H. Gossler, junior, of the city State and of New York, both being aliens to the United States of America, and Thomas M. Devens, of Charlestown, Massachusetts, a citizen of the United States of America, copartners under the firm-name and style of Gossler & Co., doing business as merchants in Boston, in our district of Massachusetts, defendants.

In an action of contract.

And the plaintiff says the defendants owe it the sum of fifteen thousand dollars for money received by the defendants to the plaintiff's use.

The writ in this cause is dated the twenty-fourth day of April,
9 A. D. 1873, and was entered at the May term of this court, A. D. 1873, when and where the parties appeared by their respective counsel, and thence the cause was continued from term to term to the May term of this court, A. D. 1874, when the following agreed statement of facts was filed, namely:

10

11 *Agreed statement of facts.*

The plaintiffs were insurers of sugar on board the North German bark Frances, from Java to Boston, by indorsements upon three policies of insurance, of dates and amounts as follows:

Policy made to Israel G. Whitney & Co.

1872, March 19. Bark Frances, port in Java to Boston; sugar.	$16,962
1872, May 22. Ship Frances, Pasoeroean to Boston; sugar.	270

Policy made to Jos. B. Glover.

1872, March 5. Nor. Ger. bark Frances, Pasoeroean to Boston; sugar	4,851
1872, March 9. Nor. Ger. bark Frances, Pasoeroean to Boston; sugar	3,717

Policy made to James Sturgis.

1872, March 6. N. G. ship Frances, ports in Java to Boston; sugar	6,188
1872, March 11. N. G. ship Frances, ports in Java to Boston; sugar	2,711

A copy of one of these policies is annexed, marked "A," and made part hereof, and the others are to be taken to be in the same form, so far as this case is concerned.

The vessel sailed from Pasoeroean, Java, for Boston, U. S. A.,
12 with said cargo on board. Soon after leaving her port of departure she encountered a hurricane, and was compelled to cut away her masts to save vessel and cargo. At the neighboring port of Sura baya, Java, she was partially repaired, and thence necessarily proceeded to Singapore, Straits Settlements, in tow of a steamer, where her repairs were completed and she was fitted to continue the voyage.

To meet the expenses of repairs upon the bark the master was compelled to borrow at Singapore the sum of $26,055.43, Singapore currency, and to execute on the 12th day of July, 1872, the bottomry bond, a copy of which is annexed and marked "B," for that sum, with marine interest at 27½ per cent.

The bark sailed from Singapore for Boston, encountered a storm in the month of December following, and was cast ashore on Cape Cod, Mass.

The defendants, who were agents of the bondholders and assignees of the bond, took measures for saving as much as possible from the wreck, and succeeded in saving somewhat less than half the sugar on board, which was forwarded to Boston.

The vessel was surveyed as she lay upon the beach, found incapable of repair, and broken up, her materials being sold. Upon learning of the disaster to the vessel, said Whitney and Company, Glover, and Sturgis, owners of cargo aforesaid, made abandonments in writing to said plaintiffs as underwriters thereon, and claimed payment for a total loss under their said policies.

The letters of abandonment were dated, respectively, Dec. 30, 1872, Dec. 28, 1872, and Dec. 31, 1872.

On the day of March, 1873, said plaintiffs paid to each of said owners the amount of a total loss under said policies, and received on the same date, from each of said owners so insured, and paid by them, an assignment and transfer in writing of "the sugar of said owners, and all their right, title, interest, trust, claim, and demand therein and thereto."

On the 21st of January, 1873, the defendants wrote to said owners, and said owners received the letter, a copy of which is annexed and marked "C."

On the same date the said owners replied to said letter by the letter, a copy of which is annexed and marked "D."

13 February 11, 1873, the owners and underwriters of said cargo wrote to the defendants the letter, a copy of which is annexed and marked "E."

February 17, 1873, the defendants replied to said owners and underwriters' letter by the letter, a copy of which is annexed and marked "F."

Upon receipt of the letter marked "D," and its enclosures, the defendants, by their agent, proceeded to and did sell the whole of said sugar saved as above stated, and now hold the money received therefor, claiming to hold it on account of said bond, and it is admitted that sufficient has not been received by defendants to pay said bond.

It is also admitted that the plaintiffs have at all times claimed said cargo saved, and the proceeds thereof held as aforesaid by defendants, as belonging to them as underwriters who had received abandonments and had subsequently paid a total loss thereon.

Other insurance was made by the China Insurance Company upon

said cargo, and if the court is of opinion that the plaintiffs are entitled to recover in this action, the cause shall be sent to an assessor to ascertain the amount for which judgment shall be entered, otherwise judgment shall be entered for the defendants, who are the assignees of said bond by a good title.

CURTIS & REED, *for Plaintiffs.*
SOHIER & WELCH, *for Defendants.*

A.

PHILADELPHIA [VIGNETTE] INCORPORATED 1835.

No. 6909. $100,000.

This policy of insurance witnesseth that the Delaware Mutual Safety Insurance Company, by these presents, do cause James Sturgis to be insured in the sum of one hundred thousand dollars, lost or not lost, at and from port or ports at or east of Cape Good Hope to port of discharge in the United States. Also, to attach on merchandise by steamers from Liverpool to United States free of particular average. Tin free of particular average, but liable for a total loss of part.

All shipments to be reported as soon as known to the assured. £ sterling valued at $6 unless otherwise agreed upon at time of indorsement.

Simultaneous with policy of same date with China Mutual
14 Insurance Company, and attaching on one-half of each shipment of merchandise, commencing after policy No. 6506, which policy is hereby cancelled for any future indorsements. This policy is to be deemed continuous until due notice by either party. On account of whom it concerns. Loss, if any, payable to James Sturgis upon one-half merchandise on board vessel or vessels or steamers the called the , whereof is master for this present voyage , or whosoever else shall be master of said vessel, or by whatever name or names the said vessel, or master thereof, shall be named or called:

Beginning the adventure upon the said vessel as aforesaid, and upon the freight or property, from and immediately following the loading of said property on board said vessel, and to continue during the voyage aforesaid on the vessel until she shall be arrived and moored at anchor twenty-four hours in safety, and on the freight and property until the property shall be safely landed.

And it shall be lawful for said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance. And in case of any loss or misfortune resulting from any peril insured against, the party insured engages for himself or themselves, his or their factors, servants, and assigns, to sue, labor, travel for, and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any part thereof; to the charges whereof the said company engages to contribute in proportion as the sum insured bears to the whole sum at risk; and the acts of the assured or assurers, or of their joint or respective agents, in preserving, securing, or saving the property insured, in case of danger or disaster, shall not be considered or held to be a waiver or acceptance of abandonment. The company having been paid the consideration for this insurance by the assured, or his or their assigns, at the rate of nominal. One per centum.

Premiums to be fixed at time of indorsement.

Touching the adventures and perils which the said insurance company

are contented to bear and take upon them, they are, of the seas, pirates, rovers, assailing thieves, jettisons, and also barratry of the master and mariners, unless the assured be owner or part owner of the vessel
15 (embezzlement and illicit trade excepted in all cases), and such other perils, losses, or misfortunes that have or shall come to the hurt, detriment, or damage of the said vessel, freight, or property, or any part thereof, as may be assumed by this policy and expressed therein. Provided, and it is expressly agreed, that the insurers shall not be liable for damage or injury to goods by dampness, change of flavor, or by being spotted, discolored, musty, or mouldy, unless the same be caused by actual contact of sea-water with the articles so damaged. And in case of partial loss by sea damage to dry-goods, cutlery, or other hardware, the loss shall be ascertained by a separation of the damaged from the undamaged portion of the damaged package or packages, respectively, and the sale of the damaged portion or portions only, and not otherwise: and the same practice shall obtain as to all other merchandise, so far as practicable. And provided, also, that the said company shall not be liable for any claim for or loss by seizure, capture, or detention, by any foreign power, or the consequences of any attempt thereat.

It is also agreed that bar, bundle, rod, hoop, and sheet iron; wire of all kinds; tin plates; steel; madder; sumac; wickerware; willow, manufactured or otherwise; cheese; salt; grain of all kinds; seeds of all kinds; fruits, whether preserved or otherwise; dry fish; vegetables and roots, prepared or otherwise; rags; hempen yarn; bags; cotton bagging, and other articles used for cotton bagging; pleasure-carriages; household furniture; musical instruments; looking-glasses; skins and hides; and all articles perishable in their own nature, are warranted by the assured free from average (except general), unless it happen by stranding, and amount to twenty per cent. on the whole aggregate value of such articles. Hemp; leaf-tobacco; tobacco-stems; bread; Indian meal; matting and cassia (except in boxes), free from average (unless general) under fifteen per cent. on the whole aggregate value of such articles. Coffee, in bags or bulk; pepper, in bags or bulk; rice; sugar; flax; and saltpetre, free from average (unless general), under seven per cent. on the whole aggregate value of such articles.

And in case of loss, such loss to be paid in sixty days after proof of loss, proof of interest, and adjustment exhibited to the assurers; the amount of the premium, or the note given for the premium, if unpaid, and all sums due to the company from the assured, when such loss becomes due, being first deducted, and all sums coming due being
16 first paid or secured to the satisfaction of the assurers. But no loss or average shall in any case be paid under five per cent. on each passage, unless general: Provided always, and it is further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then this insurance company shall be answerable only for so much of the amount as such prior insurance may be deficient towards fully covering the premises hereby insured, without any deduction for the insolvency of all or any of the underwriters, and shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said premises subsequent in date to this policy, this insurance company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them re-

ceived in the same manner as if no such subsequent assurance had been made.

It is also agreed that the vessel, freight, or property be warranted by the assured free from any charge, damage, or loss which may arise in consequence of seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; and also free from any charge, damage, loss, or claim on account of injury to any other vessel, or her cargo, arising from collision of the vessel herein named with such other vessel.

It is further agreed that, in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis for ascertaining her value shall be her valuation in this policy, and if not valued herein, then her actual value at the port to which she belonged at the time of the inception of this risk. And it is also agreed that, if the above-named vessel, upon a regular survey, shall be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be responsible on this policy. And if the voyage aforesaid shall have been begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

17 And it is further agreed that one-third shall be deducted from the cost of all repairs, of injuries, and losses on the vessel by the perils insured against (except on anchors and copper) as a commutation for the average difference between new and old, the remains of all articles replaced being considered as salvage, and accordingly deducted from the nett loss. And, instead of deducting one-third from the cost of recoppering, there shall be deducted two and a half per cent. of the nett cost of recoppering, after deducting the value of the old copper and nails, for each and every month that the copper shall have been on the vessel at the time when it is taken off, and if the copper shall have been on forty months or more the cost of recoppering shall be wholly excluded.

It is also agreed that, when the goods insured arrive at this port, no claim for loss or damage shall be allowed, unless the assured or consignee give notice to this company of the same within ten days after the landing, and also of any public sale intended to be made in consequence of such loss or damage at least two days previous to such sale, and that the company are not liable for loss or damage by wet, breakage, leakage, or exposure on goods insured as on deck.

It is also agreed that no liability is incurred under this policy for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

It is further agreed that the assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have the liberty to proceed to another port not blockaded, which shall be substituted for the blockaded port.

It is also agreed that, in all cases of return premium for short property or over-insurance, ten per cent. of the return premium shall be retained by the insurers.

It is also agreed that no assignment of this policy shall be valid unless the premium has been paid or the note given therefor is further secured by a previous indorsement of the person or persons for whose benefit said assignment is intended, and unless the consent of the insurers be first obtained.

In witness whereof the said corporation have hereunto affixed their seal, and caused these presents to be signed by their agent, W. V. Hutchings, at Boston, Mass., this nineteenth day of September, 1871.

[SEAL.] W. V. HUTCHINGS, *Agent.*

[50-cent revenue stamp.]

(Written in margin:) Sum insured, $100,000, 1 %; premium, $1,000; policy, $1; $1,001.

18 It is understood and agreed that the following risks shall attach and be covered, as described and indorsed on this policy by the company and approved by their president:

No.	Date.	Name of vessel or other conveyance.	At and From.—	Via	To—	For account of whom it may concern.	Subject insured.	Valuation.	Amount insured.	Rate. Policy	Premium.	Signature.
6,209	1871.											
	Oct. 4	No. 9, Bk. Krow Pring Von Prussian	Port Elizabeth		Boston	Each 100 bales or more subject to average.	Wool and ivory	£ stg. 6.50	36,904	1¼	615 82	
	Oct. 4	" " " " " "	" " "		"		Skins	" " "	5,437	2	108 74	
	Oct. 4								7,450	2	149 00	
	Oct. 25	Br. Ship City of Agra	Manila		New York		Hemp	Dollar @ $1.40	2,028	2	40 56	
	Nov. 13	Br. Bk. Lochnagar	"		Boston		Hemp	$6 per £ stg	15,540	2	310 20	
	Nov. 18	Br. Brig Galilee	Padang		New York		Coffee	55c. inv florin	12,658	2¼	284 80	
	Nov. 18	Ship Nesutan	Ports in Java		Boston		Sugar	55c. pr. florin	3,965	2	79 30	
	Dec. 11	Br. Bk. Cambria	Port Elizabeth		"		Skins	$6.50 £ stg	2,120	2¼	47 70	
	Dec. 22	Dutch Bk. Jan Von Brasel	Padang		New York		Coffee	55c. pr. florin				
	1872.											
	Jan. 16	Br. Bk. Cambria	Port Elizabeth		Boston		Skins	6.50 £ stg	2,018	2	40 36	
	Jan. 16	Br. Bk. Alumina	Manila		"		Hemp	1.40 dollars	5,104	2	103 28	
	Jan. 22	Br. Ship Dunedin	"		"		"	" "	3,177	2	63 54	
	Feb. 5	Br. Bk. Kate Carnie	"		New York		"	" "	5,282	2	105 64	
	Feb. 5	Br. Bk. Coringa	Padang		"		Coffee	$6 £ stg	18,834	2	376 68	
	Feb. 5	Br. Ship Sea Flower	Manila		"		Hemp	$1.40 dollars	2,642	2	52 84	
	Feb. 21	Br. Bk. Heather Bell	Port Elizabeth		Boston		Goat skins	£6	6,969	2	139 38	
	Feb. 26	Br. Bk. Heather Bell	Ports in Java		"		Sugar	55c. florin	6,188	2	123 76	
	Mar. 6	N. G. Ship Frances	" " "		"		"	" "	2,711	2	54 22	
	Mar. 11	N. G. Ship Frances	"		"		"	" "	1,503	2¾	42 58	
	Mar. 11	Br. Bk. Wm. Clowes	Melbourne		"		Sheep skins	$6.50 £ stg	3,474	2	69 48	
	Mar. 11	Br. Bk. Heather Bell	Port Elizabeth		"		"	" "				
									$144,234		$2,838 88	

19 *Indorsements.*

BOSTON, *Sept.* 18, '7-.

Pay two hundred and thirty-nine $\frac{61}{100}$ dollars, in full for gen'l av'ge on cargo for ship Lochnagar, from Manila to Boston, Nov. 13, '72.

$239 $\frac{61}{100}$

W. V. HUTCHINGS, *Agent.*

Paid Sept. 18, '72.—G. W. F.

BOSTON, *March* 1, '72.

Pay eighty-eight hundred and ninety-nine dollars, in full for total loss on cargo for bark Francis, from Java to Boston, March 6 and 11, 1872.

$8,899.

W. V. HUTCHINGS, *Agent.*

Paid March 1, '73.—G. W. F.

Policy No. 6,909. PHILADELPHIA, *September* 19, 1871.

THE DELAWARE MUTUAL SAFETY INS. COMPANY.

James Sturgis. V. or V's or St'rs. From Cape Good Hope to United States.

CARGO.

On one-half merchandise, 100,000 dollars.

Premium, nominal one per cent	$1,000
And policy	1
Six mo's note ..... dollars,	1,001

20 Received, Feb. 5, '72, additional, $100,000, at 1 per cent $1,000 00

" Feb. 19, '72, additional, $20,574, at per cent 356 62

" June 27, '72, additional, to close, at per cent 481 26

No. 7,270, addditional, $100,000. One hundred thousand dollars.

W. V. HUTCHINGS, *Agent.*

No. 7,301, additional, $20,574. Twenty thousand five hundred and seventy-four dollars.

W. V. HUTCHINGS, *Agent.*

No. 7,622, additional premium, to close policy.

W. V. HUTCHINGS, *Agent.*

[50 c't, 25 c't, and 25 c't revenue stamps.]

B.

Bottomry bond.

To all to whom these presents shall come :

I, Wilhelm Carl Bernhard Koertling, master of the German barque

or vessel called the Frances, of the burthen of four hundred and eighty-seven tons, or thereabouts, now within the harbor of Singapore, send greeting:

Whereas the said vessel lately started on her intended voyage from Java to Boston, in the United States of North America, laden with a cargo of sugar, weighing 8,253 $\frac{21}{100}$ piculs, and of rattans weighing 130 piculs; and whilst on such voyage met tempestuous weather, and in consequence thereof sustained sundry damages and losses, and was obliged to put back to Java to refit and repair, and eventually was brought thence to Singapore as the best port for that purpose.

And whereas I was necessitated to take, upon the adventure of the said vessel and her said Java cargo, and the balance of frieght due or to accrue due on the said cargo, the sum of dollars twenty-six thousand and fifty-five, and cents forty-three, Singapore currency, for the purposes of the said vessel, so as to enable her to resume and prosecute her said intended voyage to Boston, which the firm of Messieurs Behn,
21 Myer and Company, merchants and agents of Singapore, have, at my request, lent to and supplied me with, upon the security and risk of this bottomry bond, to run at interest after the rate of twenty-seven and a half per cent. on the said loan during the said intended voyage from Singapore to Boston:

Now know ye that, in consideration of the said bottomry arrangement and of the sum of dollars 26,055.43, which has been received by me in full, I, the said Wilhelm Carl Bernhard Koertling, do by these presents, for myself, my heirs, executors, and administrators, and, as far as I may and can do so, for the owner and owners of the said vessel, his and their heirs, executors, and administrators, covenant with Arnold Otto Meyer and Casper Glinz (who are the members of the said firm of Messieurs Behn, Meyer and Company), and their executors, administrators, and assigns, and the indorsees hereof—

First. That the said vessel shall as soon as practicable after the date hereof proceed hence on and complete her said intended voyage to Boston, without unnecessary deviation, with the said cargo on board.

Secondly. That I or my heirs, executors, or administrators, or the said owner or owners, his or their heirs, executors, or administrators, or the said vessel, her said cargo and freight, shall pay unto Arnold Otto Meyer and Casper Glinz, their executors, administrators, or assigns, or to the first or subsequent indorsees hereof, as by indorsement in writing hereon signed by the said firm of Messieurs Behn, Meyer and Company, or by any such first or subsequent indorsees, shall be directed and appointed, the aforesaid sum of dollars 26,055.43, Singapore currency, together with the aforesaid maritime interest thereon on the same currency, within three days after the safe arrival of the said vessel at Boston from the said intended voyage, and before any such cargo is landed or freight collected, such payment to be made as follows; that is to say, the said loan being dollars 26,055.43, and the said maritime interest of twenty-seven and a half per cent. thereon being dollars 7,165.24, amount to the aggregate sum of dollars thirty-three thousand two hundred and twenty and cents sixty-seven; which, by the exchange now agreed upon of four shillings seven pence farthing, British sterling money, per dollar Singapore currency, will amount in British sterling money to the sum of seven thousand six hundred and forty-seven pounds thirteen shillings and seven pence; and payment of this amount of British
22 sterling money to be made in Boston, either in approved on demand bills on London for that sum, or in gold at the current on demand rate on London, at the bondholders' option.

Thirdly. That the said cargo shall not be landed, or the said freight

collected, until the said payment shall have been made, and that this bondholders for the time being shall have the privilege of preventing the same.

Fourthly. That in case of failure of such payment further interest shall run and be payable on the aggregate amount due for the said loan and maritime interest which ought to have been so paid, such further interest to run at the usual current rate in Boston upon all or so much of such aggregate amount as may for the time being remain due and unpaid; such further interest to be in the dollar of Singapore currency, and to be paid at the same exchange in British sterling money, and in the same mode as the principal loan and maritime interest as hereinbefore provided:

Provided, nevertheless, and it is hereby agreed, that if, in the course of the said voyage, an utter loss of the said vessel by fire, lightning, enemies, men-of-war, or any other perils, dangers, accidents, or casualties of the seas or navigation shall unavoidably happen, then the said loan and interest shall not be payable, and all parties liable therefor shall be wholly discharged therefrom, and the loss shall be wholly borne by the said lenders or bondholders, and everything herein contained for payment thereof shall be void and determined; save and except only, and provided in such case, that the said lenders or bondholders shall be entitled to such average as can be hereby lawfully secured to them on all salvage recoverable in respect to the said vessel, freight, and goods, or any of them.

And I do hereby further bind the said vessel, her tackle, apparel, and furniture, and the said cargo of sugar and rattans, and the said accrued and accruing freight still remaining unpaid, and mortgage and assign the same to the said Arnold Otto Meyer and Casper Glinz, their executors, administrators, or assigns, and the indorsees hereof, by way of bottomry as security for the payment (of the said loan and interest and the fulfilment)* of the engagements hereinbefore specified.

23 In witness whereof I, the said master, have hereunto set my hand and seal this twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-two.

W. KÖRTLING. *Master.* [L. S.]

Signed, sealed, and delivered in the presence of—

J. C. MITCHELL,
Of Singapore, clerk to Mr B. Rodyk, Notary Public.
B. M. SHEREFF, do. do.
B. RODYK, *Notary Public.* [L. S.]

To all to whom these presents shall come:

I, Bernard Rodyk, notary public, duly authorized, admitted, and sworn, residing and practicing at Singapore, in the colony of the Straits Settlements, do hereby certify and attest unto all whom it may concern that the foregoing bottomry bond was duly signed and sealed by Wilhelm Carl Bernhard Koertling, therein named, in my presence and in the presence of James Charles Mitchell and Benjamin Manuel Shereff, both of Singapore, and both clerks to me, the said notary. To the due execution whereof, an act being requested, I have granted the same under my notarial form and seal of office, to serve and avail as occasion may require.

Done and passed at Singapore aforesaid, this twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-two.

[L. S.] (Signed) B. RODYK, *Notary Public.*

*Interlineation a mistake in copying: not in the original.—G. H. F., N. P.

CONSULATE OF THE UNITED STATES OF AMERICA,
At Singapore, July 13, 1872.

I, the undersigned, consul of the United States of America for Singapore and the dependencies thereunto belonging, hereby certify that the above signature of Bernard Bodyk, a notary public at Singapore, personally to me known, as well as his notarial seal, are true and genuine, and as such deserving full faith and credit.

Given under my hand and the seal of this consulate, this 13th day of July, 1872.

(Signed) A. G. STUDER, *U. S. Consul.* [L. S.]

24 Pay to F. Laeisz, esq., or to his indorsees, the amount due on this security.

Singapore, 12th July, 1872.

(Signed) BEHN, MEYER & CO.

Pay to Mess'rs Gossler & Co., or their orders.

Hamburg, 22d August, 1872.

F. LAEISZ, HAMBURG. 22D AUG., 1872. (Signed) F. LAEISZ.

UNITED STATES OF AMERICA,
Suffolk, ss. Commonwealth of Massachusetts, City of Boston:

I, George H. Folger, a notary public duly commissioned and sworn in and for the county aforesaid, certify the foregoing to be a true and exact copy of an original bottomry bond of the master of the bark Frances, now before me.

In testimony whereof I have hereunto set my hand and notarial seal, this twenty-seventh day of January, A. D. 1873.

[L. S.] GEORGE H. FOLGER,
Notary Public.

C.

(Copy.)

BOSTON, *Jan.* 21, 1873.

Mess'rs W. B. Bacon, J. B. Glover, Ja's Sturgis, I. G. Whitney & Co., owners of sugar and rattans on board the German bark Frances.

GENTLEMEN: You are aware of our holding a bottomry bond, given by the late master of the bark Frances, and also that, acting under your authority, as expressed or implied, we have been endeavoring to save the vessel and the cargo. A large part of the sugar, say about one-half, has been saved and delivered (more or less damaged) in Boston; also a part of the rattans. We now learn from Capt. E. S. Smith, the underwriters' agent, that the bark has filled with water, and
25 there is little probability of saving any more cargo. Will you now authorize us to sell the cargo, in order that we may, first, pay the expenses that have been incurred in saving it; and second, that we may apply the money remaining in our hands after paying such expenses, if any shall then remain, to the payment of the bond aforesaid? We do not wish to sell the property without written authority so to do. If you will give this authority, as the sole owners of the cargo, our right of action will, of course, be undisputed.

We are, gentlemen, very truly, your obedient servants.

(Signed) GOSSLER & CO.

D.

(Copy.)

BOSTON, *Jan.* 21, 1873.

Mess'rs GOSSLER & CO., *Boston:*

DEAR SIRS: In reply to your letter of this date, we authorize you to sell the cargo which was shipped to us by the N. G. barque Frances, from Java, so far as we are concerned.

Your ob'd't servants,

(Signed) WM B. BACON,
JOSEPH B. GLOVER,
ISRAEL G. WHITNEY & CO.,
JAMES STURGIS,
By GEO. L. HUNTINGTON, *Att'y.*

(Copy.)

BOSTON, *Jan.* 2, 1873.

Mess'rs GOSSLER & CO., *Boston:*

DEAR SIRS: Enclosed we hand you the following bills lading of merchandise per N. G. b'k Frances:

26	G B—L.....	260	baskets	sugar	....	918.89	peculs.	
	B "	637	"	"	....	2,135.05	"	
S	"	369	"	"	....	1,206.34	"	
G	"	350	"	"	....	1,216.20	"	
S	"	232	"	"	....	784.86	"	
W	"	218	"	"	....	728.36	"	
W	"	400	"	"	....	1,264.19	"	
		2,466	baskets.....			8,253.89	peculs.	
	"	2,690	b'dl's rattans.....			130.00	"	

We also enclose bill of the charterers of N. G. bark Frances against said bark and owners for $4,150.07, gold, being amount due the charterers for advances made in Java, as per indorsement on the charter party. The charge of ¼ % made by bankers was for domiciling the drafts in London.

Yours, truly,

(Signed) J. C. ROGERS & CO.,
For the Owners of Sugars and Rattans and for Charterers.

E.

(Copy.)

FIRE AND MARINE INSURANCE.

Office corner of State and Devonshire streets.

W. V. HUTCHINGS. W. H. VINCENT.

BOSTON, *Feb.* 11, 1873.

To Messrs. GOSSLER & CO., *Boston:*

GENTLEMEN: The undersigned underwriters and owners of the cargo

of sugar per bark Francis hereby notify you that all moneys now in your hands, proceeds of any portion of the cargo of said bark, and saved from the wreck of the same, are claimed as lawfully belonging to them.

Suit will be brought without delay to obtain the decision of the
27 court upon said claim, and in the mean time you are notified to hold all such moneys until such decision is obtained.

Respectfully, your ob'd't servants,

CHINA MUTUAL INS. CO.
DELAWARE MUT. SAFETY INS. CO.
WM B. BACON.
JA'S STURGIS.
JOS. B. GLOVER.

F.

(Copy.)

BOSTON, *Feb.* 17, 1873.

GENTLEMEN: We received your favor of 11th inst., and contents are duly noted.

We have advised the Hamburg underwriters in regard to your claim for the proceeds of the cargo saved of the Frances, and shall inform you as soon as we have their answer. In the mean time we have taken legal advice.

No disposition will be made of the proceeds in our hands until this matter is settled.

We are, very respectfully,

(Signed) GOSSLER & CO.

To the underwriters, Mess'rs James Sturgis and others, Boston.

28

29 At the same term the following additional stipulation was filed, namely:

Additional stipulation.

It is agreed that the following deposition of Joseph P. Johnson be annexed to the agreed statement of facts heretofore filed in this case, as a part of the same, and that the statements therein made be taken to be true, and the agreed statement aforesaid modified in accordance with the same.

Deposition of Joseph P. Johnson.

I am sixty years old. My residence is at Provincetown, Mass. I am the agent for the board of underwriters of Boston, and an auctioneer. On the twenty-seventh of January, 1873, I sold at auction the materials of the barque Frances, and on the fifth of February I sold the hull, and the chains and anchors of the barque. The materials sold were the sails, rigging, etc., appliances naturally belonging to a ship. I sold them on the back of Cape Cod, near Highland Light, Truro. The amount of sales was $2,323.70. They were sold in lots. The hull and chains and anchors were sold separately. Nehemiah Gibson, of Boston, purchased the hull. The vessel was full of water, and had the appearance of a break amid-

ships. She was an iron vessel. We had, before the sale, discharged about one-half of the cargo. Then we had a heavy blow, which
30 caused her to leak very badly. She filled with water, which dissolved the balance of her cargo, which was sugar. The then agent for the underwriters, M'r Smith, abandoned further work on the ship, and discharged the men, and he then ordered me to advertise the materials of the ship for sale, which I did, and they were sold on the twenty-seventh of January, 1873. On the eighth of February he ordered me to sell the hull, chains, and anchors, which I did. She then lay on the beach inside of the bars. She lay head on, and was full of water. She came up on the beach as high as she could, being full of water, but was still so low down as to be submerged at high water. At ordinary tides I should say the rise and fall of the tide on that side of the cape is ten feet. At neap tides about eight feet, perhaps. The vessel sold for two thousand dollars. There were about one hundred persons present at the auction.

My experience is that a wooden ship will stand a great deal heavier pounding on the back of the cape than an iron ship. What I mean is, a much larger proportion of wooden ships are gotten off than of iron, for the reason that a wooden ship will hog up, and after coming afloat may straighten again, but in an iron vessel the sands cut away from the bow and stern, and, instead of hogging up, they break; they can't give much. I have been engaged in working on wrecks since 1850.

All the masts, rigging, and appurtenances of the barque were saved, either ashore or on the vessel. When we were getting out the cargo, if it was rather too rough, we worked at stripping her, and getting the materials ashore. The chains, anchors, and other utensils sold on the last day brought $1,494.75.

Cross-examination:

I worked upon the barque in saving the cargo. When she first came on she forged over the bar, and at high water lay afloat inside the bar. At low water she was aground. There was no water of any consequence in her then. There was a little leak in her stern, but she was built in compartments, and her stern pump would keep her free. We then endeavored, by direction of the underwriters' agent, to get her cargo
31 all out before getting her over the bar, but when it was only partly out another gale drove her up on to the inner beach. The water that afterwards came in, came in at the break amidships. Every night we barred down the hatches.

When the hull was sold, the lower masts and standing rigging were sold with it. M'r Smith, the underwriters' agent, was there all the time. It is a common practice to strip a vessel of her top hamper, when we are discharging her in the winter season. If the top hamper is up, some ships won't stand up, but are top-heavy. When the other materials were taken from her and sold, M'r Smith had abandoned the idea of getting her off. She had then forged up on to the inner beach as far as she could go, being full of water. She wasn't far up on the beach.

At the time she was sold she had settled down into the sand only a very little. About three weeks ago I saw some of her remains lying there. She is pretty badly broken up now. She is settled down very much into the sand.

An attempt was made to get the barque off. The parties that purchased her procured a steam pump from Boston immediately, and a tugboat to accompany it, put the pump on board the wreck, and got it in working condition just before night. That night there came on a very

heavy blow, and it was with great difficulty that they saved their pump, taking it off immediately the next morning.

My only instructions from M'r Smith were to sell her for the benefit of whom it might concern. I can't say why she sold so low. It was the most we could get. I thought it was a fair price for her in her situation. I could not refuse to let her go. There had been bids on her. I thought there was a great risk of not getting her off, so much so as not to warrant a man in paying more than that for her. I know the parties who bought her from M'r Gibson, but not what they paid. She was bought by N. D. Freeman, Joshua E. Bowley, Stephen Cook, David Conwell, and Edmund Smith, all of Provincetown. Some of them were at the auction, and M'r Freeman bought considerable of the materials. I don't think either of them bid on her. Others did.

When the materials were sold, on the twenty-seventh of January, she had been driven on to the inner beach. She had filled with water, and the cargo was dissolved before anything was sold.

32 M'r Smith is dead. He died on the eighth of August, 1873.

I should think the value of such a hull as that of this barque, afloat and outside the outer bar, in a seaworthy condition, would be about $30,000, at a rough guess.

Direct examination resumed:

If the vessel had been afloat inside the bar, there would have been no difficulty whatever in getting her outside of the bar, after the cargo was out.

The vessel was sold at about low water.

It is further agreed that the hull of said vessel, as she lay upon the beach, was sold by Nehemiah Gibson, on the same day that he purchased it, for the sum of $5,800 or $6,000.

It is also further stipulated that this action shall be taken to have been correctly brought in the name of the plaintiff.

CURTIS & REED,
For Plaintiffs.
SOHIER & WELCH,
For Defendants.

33 This cause was thence continued to the present October term of this court, A. D. 1874, when the same is set down for hearing and fully heard before the honorable George F. Shepley, circuit judge, who, after due consideration thereon had, on the sixteenth day of March, A. D. 1875, reads his opinion therein, and it is thereupon, to wit, March 16, 1875, considered by the court that the said plaintiff take nothing by its said writ, and that the said defendants, John H. Gossler, John H. Gossler, junior, and Thomas M. Devens, copartners under the firm-name of Gossler & Co., recover of the said plaintiff, the Delaware Mutual Safety Insurance Company, their costs of suit, taxed at .

A true record.—Attest:

JOHN G. STETSON, *Clerk.*

The findings of the court, and the opinion of the court filed in said cause upon which the judgment therein was entered March 16, 1875, are as follows, namely:

35 Circuit court of the United States, district of Massachusetts.

THE DELAWARE MUTUAL SAFETY INSURANCE Company, of Philadelphia,
v.
JOHN H. GOSSLER ET AL.

Statement of facts.

SHEPLEY, J.:

The plaintiffs were insurers of a cargo of sugar on board the North German bark Francis, from Java to Boston. The vessel sailed from Pasoeroean, Java, with said cargo on board. Soon after leaving her port of departure she encountered a hurricane, and was compelled to cut away her masts to save vessel and cargo. At the neighboring port of Surabaya, Java, she was partially repaired, and thence necessarily proceeded to Singapore, Straits Settlement, in tow of a steamer, where her repairs were completed, and she was fitted to continue the voyage.

To meet the expenses of repairs upon the bark, the master was compelled to borrow at Singapore the sum of $\$26{,}055\frac{43}{100}$, Singapore currency, and to execute, on the 12th day of July, 1872, a bottomry
36 bond for that sum, with marine interest at $27\frac{1}{2}$ per cent. upon the vessel and freight.

The bark sailed from Singapore for Boston, encountered a storm in the month of December following, and was cast ashore on Cape Cod, Mass.

The defendants, who were agents of the bondholders and assignees of the bond, took measures for saving as much as possible from the wreck, and succeeded in saving somewhat less than half the sugar on board, which was forwarded to Boston.

The vessel was surveyed as she lay upon the beach, found incapable of repair, and broken up, her material being sold. When the vessel was sold, she laid "on the beach, full of water, as high as she could, but so low as to be submerged at high water." The hull was sold for two thousand dollars, and was resold by the purchaser on the same day for about six thousand dollars. The chains and anchors, sails and rigging were separately sold.

Upon learning of the disaster to the vessel, the owners of cargo aforesaid made abandonments in writing to said plaintiffs as underwriters thereon, and claimed payment for a total loss under their said policies.
37 The letters of abandonment were dated, respectively, December 30th, 1872, Dec. 28th, 1872, and Dec. 31st, 1872.

On the day of March, 1873, said plaintiffs paid to each of said owners the amount of a total loss under said policies, and received on the same date, from each of said owners so insured, and paid by them, an assignment and transfer in writing of "the sugar of said owners and all their right, title, interest, trusts, claim, and demand therein and thereto."

Defendants as agents of the bondholders, with the consent of the owners of the cargo, proceeded to sell the sugar saved, and now hold the proceeds, claiming them on account of said bond, the nett proceeds of the saved cargo not being sufficient to satisfy the bond. The underwriters on the cargo have also, at all times, claimed the cargo saved and the proceeds, as underwriters who have accepted abandonments, and subsequently paid a total loss thereon, and this action is brought for the recovery of the same.

38 *Opinion of the court*—(*March* 16, 1875.)

SHEPLEY, J.:

This contract of bottomry and respondentia contains the following condition, upon the construction of which, as affecting the rights of the parties at common law, upon the well-settled principles of law applicable to similar contracts, depends the ownership of the fund in controversy. "Provided, nevertheless, and it is hereby agreed, that if in the course of the said voyage an utter loss of the said vessel by fire, lightening, enemies, men-of-war, or any other perils, dangers, accidents, or casualties of the seas or navigation, shall unavoidably happen, then the said loan and interest shall not be payable, and all parties liable therefore shall be wholly discharged therefrom and the loss shall be wholly borne by the said lenders or bondholders, and everything herein contained for payment thereof shall be void and determined, save and except only, and provided in such case, that the said lenders or bond-
39 holders shall be entitled to such average as can be hereby lawfully secured to them on all salvage, recoverable in respect to the said vessel, freight, and goods, or any of them."

The meaning of the clause of exception at the close of this condition is not obvious at the first glance. It is claimed that the effect of it is to give to the bondholder, to the extent of the sum due to him, all the property saved in case of wreck. If that was the purpose of the clause, it could have been simply expressed in language free from ambiguity. But the language does not entitle the bondholders to the effects saved. It does not entitle them to salvage, but "to such average as can be lawfully secured to them (the bondholders) on all salvage recoverable," &c.

Perhaps some light may be thrown upon the history of the use of such a phrase as average upon salvage, in connection with the right of the lender upon general adventure to a claim upon any of the effects saved, by reading the discussion between Valin and Emerigon, to be found in the commentary of Valin upon the Ordonnance de la Marine, art. xviii, tit. v, liv. iii, "des contrats à grosse aventures."

40 The article itself provides, "Sil y a contrate à la grosse & assurance sur un même chargement, le donneur sera préféré aux assueurs sur les effets sauvis du naufrage, pour son capital seulement." If there be a contract of maritime loan and an insurance upon the same cargo, the lender shall be preferred to the insurers upon the effects preserved from shipwreck for his capital, and no further. In commenting upon this article, Valin zealously contends against what he considers the gross injustice of such a preference of the lender upon bottomry, or respondentia upon the goods saved, over the insurer, and he supposes the case of a cargo worth twenty thousand livres, on which the bondholder had a claim for ten thousand, and there was insurance to the amount of ten thousand on the surplus, insisting that in such a case the insurer should share proportionably with the bondholders in the effects saved. He refers the question to Emerigon, who does not concur in the views of Valin, and gives conclusive reasons against the construction contended for by Valin; adding that he has consulted the tribunal of the admiralty at Marseilles, where the opinions were unanimous
41 that this privilege was conceded to the bondholder, by the eighteenth article in favor of commerce. Bonlay Paty also agrees with Emerigon.

The views of Valin never seem to have been recognized in the commercial code of any nation. It is worthy of note, however, that he con-

tended that the lender upon bottomry, or respondentia, should share with the insurer or the owner in the effects saved, in proportion to their respective interests in the property at risk. This would have been an "average of the salvage." The insertion of this clause might have resulted from an attempt to establish, by agreement of the parties, a rule of division of the effects saved, between the bottomry lender and the insurer, in proportion to their respective interests, in lieu of the well-established rule of the maritime law, which prefers the bondholder to the extent of his original loan.

Sir Robert Phillimore, in the case of The Great Pacific (L. R. 6, Ad. & Sec., 385), after adverting to the fact that a stipulation couched in these very words was of common occurrence, and found in the old
42 forms of bonds in the early editions of Abbott on Shipping, and in the edition of 1781 of Westkitt's Digest of the Laws of Insurance, speaks of it as derived, probably, from the mercantile usages of Spain, with respect to vessels trading with the Spanish West Indies, and that it referred to cases in which the ship had been so wrecked that portions of her alone remained, such as planks, spars, rigging, and the like, when, to use the expression of Emerigon, "Les débris du navire naufragi existent, mais le navire n' existe plus."

The case of the Great Pacific was heard on appeal from the high court of admiralty to the privy council. Stephens, app'l't v. Brownfield et al. (L. R., 2 P. C., page 516). Sir James W. Colville, in pronouncing the judgment in the case, says with reference to this clause, "Whatever it means, their lordships believe that it was intended to secure the payment to the bondholders of something which the obligors might become entitled to receive from third parties in respect of the ship, and not a division of the proceeds of the sale of the vessel between the bondholders and the ship-owners. It would meet the
43 case suggested at the bar, in which the vessel having been voluntarily stranded, with a view to the preservation of the cargo, general average upon the cargo salved might become due from the owners of that cargo to the owners of the ship.

"That such average would become due, if the ship, failing to get off, is totally lost, seems to be a question upon which jurists are not agreed (see Abbott on Shipping 10th edition, pp. 373, 375, and 2 Phillips on Insurance, § 1315), but the clause may, nevertheless, have been designed to cover such average, if the right to it existed."

The judgment in that case was, whatever might be the construction of the clause, it could have no operation in the case of the Great Pacific, unless there had been a loss of the vessel within the meaning of the clause, and there had been no such loss in that case, because the ship remained in specie, though so much damaged as not to be worth repairing.

It may be well to note that the words in the condition in the case of the Great Pacific were, "in case of loss," and in this case "in case of utter loss," and to remark that the sum for which the hull of the
44 ship sold, after the disaster, bore about the same proportion to the original value as in the case at bar.

Whatever be the true construction of this exception, it is manifest that the exception can have no application to the facts in this case. The exception applies only in case of "a'utter loss," and not of a constructive total loss of the vessel. The words are "save and except only and provided in such case that the said lenders or bondholders shall be entitled to such average as can hereby be lawfully secured to them on all salvage recoverable in respect to the said vessel, freight, and goods,

or any of them." The words in such case refer to the contingency, and the only contingency, provided for in the preceding paragraph of the exception, "if, in the course of the said voyage an utter loss of the said vessel by fire, lightening, enemies, men-of-war, or any other perils, dangers, accidents, or casualties of the seas or navigation shall unavoidably happen."

The exception is therefore applicable only in case of "an utter loss" of the said vessel. In this case the vessel did not arrive at her
45 port of destination; she was sold at an intermediate place, on the beach, near Truro, Cape Cod, by the voluntary act of the underwriters (who, after the abandonment, were the owners), in the exercise of a wise discretion, because the expense of the necessary repairs would have exceeded the value of the vessel when repaired, and because there was not a reasonable expectation of getting her off the beach where she was stranded without an expenditure which would not have been justified by the existing state of facts.

There was clearly a constructive total loss of the ship, which would have entitled her owners to recover from the underwriters the whole amount of her insurance, but there was not that actual or absolute total loss, or, in the words of the condition of this bond, that "utter loss," which would discharge from his liability the borrower of money upon bottomry, inasmuch as the ship existed in specie at the time of her sale.

"There is not, in respect to the contract" (of bottomry), "any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on bottomry." "The
46 property saved, whatever it may be in amount, continues subject to the hypothecation." (3 Kent Com., § 359.) Lord Ellenborough, in Thomson *v.* The Royal Exchange Assurance Co. (1 M. & S., 30), says: "In the case of bottomry nothing short of a total destruction of the ship will constitute an utter loss; if it exists in specie in the hands of the owner it will prevent an utter loss."

In "The Catharine" (1 L. & E., page ; S. C., 15 Jur., 231), D'r Lushington, referring to the case last cited, says: "In that case Lord Ellenborough decided that the bond could not be lost so long as the vessel remained in specie. That was the law of this country long before Lord Ellenborough so declared it. If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit." (See also the Dante, 2 W'm Robinson, 427; The Draco, 2 Lumner., 157; The Elephanta, 9 L. & E., 553.)

In Broomfield v. The Southern Ins. Co. (L. R., 5 Ex., page 192), Martin, Baron, says: "Now it has been held that in construing a bottomry-bond loss means a loss by going to the bottom of the sea." This was an action upon a policy of insurance upon the bottomry bond
47 given on the Great Pacific, and the court of exchequer followed the decision of the privy council in Stephens v. Bloomfield (L. R., 2 P. C., 516).

"Utterly lost," says Tilghman, C. J., "is a strong expression, intended, as I conceive, to be distinguished from technically lost. A ship is not utterly lost while she remains in specie in the hands of the owners. Had she been taken by an enemy she would have been utterly lost to the owner. So had she been burnt, or wrecked and gone to pieces. But she is not utterly lost merely because it may cost more than she is worth to repair her." (Insurance Co. of Pennsylvania v. Duval et al., 8 S. & R., 138.)

This was the case of a respondentia bond of a form peculiar to Phila-

delphia, which, in case of utter loss of the vessel, entitled the lenders to a just and proportional average on cargo not unavoidably lost, and made the lenders liable to average and entitled to salvage in the same manner as if they were underwriters.

It is clear, therefore, that no utter loss of the vessel has hap-
48 pened which would render the contract void. The rights of the parties are dependant upon the state of facts at the time of the sale of the ship when she existed in specie, and not affected by the subsequent total destruction of the vessel. This was so settled M'r Justice Story, in the case of the Draco.

The clause of exception, which only applies in case of an utter loss, has no application to the case at bar. The rights of the bondholders are the ordinary rights of a lender upon maritime contracts of this description, in case of shipwreck, to the salved effects to the extent of his loan.

The definition by Bynkershoek of the contract shows what the rights are. He defines such contracts to be a pledge of the vessel, or other effects upon which the loan is made, and of what may remain of them after any event, by which the personal responsibility of the borrowers is excused. (Bynk., Quaest. Pub., lib. 3, c. 16.)

By the French ordinance (tit. v, art. 17), it was provided that, in case of shipwreck, the contracts of maritime loan shall be reduced to the value of the effects that are saved. Seront toutefois, en cas de
49 naufrage, les contrats à la grosse réduits à la valuer des effets sauvés.

Emerigon says: "From the moment of the accident the lender is seized of right of the effects saved. He has a special lien upon them for the payment of his debt, saving the freight and salvage."

By the general marine law the lender on bottomry is entitled to be paid out of the effects saved, as far as those effects go, if the voyage be disastrous. (Kent's Com., 12th ed., 359, 360.) "The property saved, whatever may be the amount, continues subject to the hypothecation. The borrowers, in case of shipwreck, are not personally bound, except to the extent of the salved effects, or their proceeds, which come into their hands." (The Virgin, 8 Peters, 538.)

The bond in this case is upon both ship and cargo, a bottomry and respondentia bond united. The maritime risk, however, upon which the bond is conditioned is that of the utter loss of the ship. It was suggested at the argument that the two subjects of the hypothecation might be divided, and each governed by its own law merchant.
50 I think this contradicts that clause in the bond which provides that, in case of a utter loss of the vessel, the bond shall not be payable.

If at the time in reference to which the rights respectively of the lender and the borrower are to be determined, namely, the time when the sale took place, there had been an utter loss of the vessel by either of the risks enumerated, I am of opinion that the bond would have been void, and the bondholders would have lost all claim, under this form of bond, to the cargo saved.

A case in many respects like this is put and answered in the second title of the twenty-second book of the Digests, entitled De Nautico Foenore, law v, Paulus, lib. 25, Quaestionum: "When maritime money is thus given, the lender has no right to demand his money unless the vessel arrives in safety at the stipulated time. The obligation of the debt is extinguished by the non-existence of the condition, and therefore the lien on the pledge is also gone, even on those that are not lost."

In this case the vessel did not arrive in safety, but the voyage being

terminated by a sale at an intermediate place, while the *the* ves-
51 sel existed, in specie, and was only constructively totally lost as affecting a contract of insurance, but not utterly lost within the meaning of the condition in a bottomry bond, the property saved continues subject to the hypothecation.

Judgment for defendants.

52 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of The Delaware Mutual Safety Insurance Company, plaintiff, v. John H. Gossler et al., defendants, in said circuit court determined.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at Boston, in said district, this fourth day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

[SEAL.] JOHN G. STETSON, *Clerk.*

53 Know all men by these presents that we, the Delaware Mutual Safety Insurance Company, a corporation created under and by virtue of the laws of the State of Pennsylvania, and having its principal place of business in Philadelphia, in said State of Pennsylvania, and W'm V. Hutchings and George W. Fisher, of Boston, are held and firmly bound unto John H. Gossler, of Hamburg, in Germany, John H. Gossler, j'r, of the city and State of New York, both being aliens to the United States of America, & Thomas M. Devens, of Boston, Massachusetts, copartners under the name, firm, & style of Gossler & Co., defendants in a suit hereinafter mentioned, in the full and just sum of three hundred dollars, to be paid to the said defendants, their certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the sixteenth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between the said Delaware Mutual Safety Insurance Company, plaintiffs, and the said defendants, judgment was rendered against the said Delaware Mutual Safety Insurance Company, and the said Delaware Mutual Safety Insurance Company having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Delaware Mutual Safety Insurance Company shall prosecute its said writ of error to effect, and answer all damages and costs if *he* fail to

make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THOMAS HOWARD, [L. S.]
Pres't.

HENRY LYLBURN, *Secretary.*

W. V. HUTCHINGS. [L. S.]
GEO. W. FISHER. [L. S.]

Signed, sealed, and delivered in presence of—
SIDNEY D. SHATTUCK, witness to the signatures of W. V. Hutchings & Geo. W. Fisher.

Approved:

SOHIER & WELCH,
Counsel & Att'ys for D'f'ts.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 275. The Delaware Mutual Safety Insurance Company, plaintiff in error, vs. John H. Gossler et al. Massachusetts C. C. U. S. Filed 21st October, 1875.

SUPREME COURT OF THE UNITED STATES.

THE DELAWARE MUTUAL SAFETY INS. CO.,
PLAINTIFF IN ERROR,
vs.
JOHN H. GOSSLER ET AL.

No. 275.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM G. RUSSELL,
CHARLES M. REED,
of Counsel.

Supreme Court of the United States.

No. 275.

THE DELAWARE MUTUAL SAFETY INSURANCE CO.,
PLAINTIFF IN ERROR,
v.
JOHN H. GOSSLER ET AL.

BRIEF FOR PLAINTIFF IN ERROR.

ABSTRACT OF THE CASE.

This was an action for money had and received by the defendants to the use of the plaintiffs, and was heard upon the agreed statement of facts which forms a part of the record in this Court.

The money in dispute is the proceeds of the sale of certain sugars which formed a part of the cargo of the barque "Frances," on her voyage from Java to Boston.

The vessel was wrecked on the voyage, but a part of the cargo was saved and sold.

The plaintiff company were underwriters on the cargo; and having accepted an abandonment and paid a total loss, are subrogated to the rights of the original owners of the cargo to any portion saved. It is admitted that the action is correctly brought in their names.

The defendants, who are assignees of a bottomry bond given upon the ship, cargo and freight, took possession of the sugars, and claim to hold their proceeds as such assignees.

The bond is given in full on page 9 of the Record.

It covers ship, cargo and freight. The condition of the bond is as follows: —

"*Provided*, nevertheless, and it is hereby agreed, that if, in the course of said voyage, *an utter loss of the said vessel*, by fire, lightning, enemies, men-of-war, or any other perils, dangers, accidents or casualties of the seas or navigation, shall unavoidably happen, then the said loan and interest shall not be payable, and all parties liable therefor shall be wholly discharged therefrom, and the loss shall be wholly borne by the said lenders or bondholders, and everything herein contained for payment thereof shall be void and determined; save and except only, and provided in such case that the said lenders or bondholders shall be entitled to such average as can be hereby lawfully secured to them on all salvage, recoverable in respect to the said vessel, freight and goods, or any of them."

The questions raised and argued in the Court below related entirely to the rights of the defendants under this bond, and were, —

1. Whether the facts agreed upon showed that an "utter loss" of the vessel had taken place within the meaning of that term in the bond.

2. Whether, admitting the vessel to be utterly lost, the bondholders were, independent of any provision to that effect in the bond, entitled as matter of law to the portion of the cargo saved or its proceeds.

3. Whether such right to the cargo saved was conferred upon the bondholders by the clause above cited, which entitled them "*to such average as can be hereby lawfully secured to them on all salvage recoverable in respect to said vessel, freight, or goods, or any of them.*"

Judgment was rendered in the Circuit Court for the defendants solely upon the first of the points above stated, as appears from the opinion of the presiding Judge.

ASSIGNMENT OF ERRORS.

The plaintiffs thereupon sued out this writ of error, and assign, as the errors relied upon, —

1. That the said Circuit Court was in error in holding that the facts disclosed in the agreed statement on which the cause was heard did not show an utter loss of the vessel.

2. That said Court was in error in holding that under the facts agreed upon the defendants were entitled to retain the proceeds of the portion of the cargo saved and sold.

PLAINTIFF'S POINTS.

I.

THE AGREED FACTS SHOW AN "UTTER LOSS" OF THE VESSEL.

These facts are, that in December, 1872, the barque went ashore on the outside of Cape Cod, near Highland Light, in Truro, Mass. She forged over the outer bar, and for a while remained in comparatively deep water, floating at high tide and at low water aground. She then leaked somewhat from a leak in the stern, but could be kept free by the pumps. While in this condition a portion of her cargo was discharged, under the direction of the underwriters' agent, with the view of lightening and getting her over the bar.

About half the cargo was thus discharged when another severe gale drove the vessel further on shore and made a breach in her amidships, causing her to leak very badly, and filling her with water, which dissolved the balance of the sugar composing her cargo.

The spars, rigging, and other appurtenances of the ship were advertised and sold at auction January 27, 1873.

A survey was held and the vessel found irreparable. The underwriters' agent, who acted also as the agent of the bondholders, having abandoned all hope of getting her off, caused the hull, chains, and anchors to be sold at public auction.

The hull, which was of iron, brought about $2,000, and was resold on the same day for about $6,000. The purchasers made an attempt to get her off. They sent at once to Boston for a steam tug and steam pump, and placed the latter in position on the wreck. The same night another gale arose; and they barely saved the pump, abandoning any further hope of saving the vessel. It does not, however, appear that this gale inflicted any additional injury to the vessel. She was afterwards dismantled, and her remains still lie on the shore imbedded in the sand.

At the time of the sale the vessel was full of water, badly broken amidships, and as far up on the shore as she would go. At high tide she was entirely submerged.

It is admitted that the vessel was never gotten off, and that she eventually became a complete wreck, so as to be "utterly lost" within the terms of the bond.

We contend that the event determined that she was an utter loss at the time of sale, if that be material.

The Court will observe that the agreed facts show that the vessel was sold, not because it was *unprofitable* to repair her, or to get her off, as is assumed by learned Judge of the Circuit Court, but because she was *incapable* of repair, and because it was impossible to get her off from the shore where she was wrecked so that she could be made to sail the seas again as a ship.

See Record, p. 3, ¶ 6; p. 17, ¶ 5.

As to what constitutes an utter loss under a bottomry

bond, the leading case is Thompson *v.* Royal Exchange Assurance Co., 1 Maule & Selw. 30.

Lord Ellenborough there held that a constructive total loss would not discharge the borrower, but that "an actual total loss" was necessary for this purpose; and at the close of the opinion he uses this language, "Nothing short of a total destruction of the ship will constitute an utter loss. If it exists in specie in the hands of the owner, it will prevent an utter loss."

The case before his lordship was one of constructive total loss only. The vessel was in existence as such and capable of repair, though at an expense disproportionate to her value.

The same was the fact in the subsequent cases of "The Catharine," "The Elephanta," "The Great Pacific," relied upon by the defendants.

In "The Elephanta," 9 Eng. L. & E. 553, 15 Jur. 1185, Lord Ellenborough's opinion is carefully examined by Dr. Lushington. In that case it was claimed that although the vessel was capable of repair, yet the repairs could not be executed in the port where the vessel lay.

Dr. Lushington held that it was not as matter of fact proved that the repairs could not have been executed, and enforced the bond on that ground, expressly declining to decide whether the mere existence of the ship in specie would be sufficient to keep the bond alive.

As a matter of principle, it is difficult to see any distinction between the case of a ship broken to pieces and her fragments cast upon the shore, and that of a ship too much injured by sea perils to proceed without repairs, and yet in such a situation, without default of the owners, that the repairs cannot be procured.

In neither case is the ship of any further value to the owners as a ship, and in both cases the performance of the condition of the bond, viz., the arrival of the vessel at the port of destination, has been prevented by perils of the seas without any default of the borrower. Unless she does so arrive, the owners derive no benefit from the repairs to meet which the loan was effected.

The case is still stronger where a vessel is stranded and wrecked and cannot be got off, and where, though she retains for a time the form of a ship, she has been deprived forever of the only valuable quality of a ship, the capacity of sailing upon the seas and carrying a cargo, and where it is only a question of time when the elements will completely dismember her.

If a vessel is fast upon the shore, and beyond hope of recovery, she is none the less, for all practical purposes, "a mere congeries of planks," because these planks happen to be fastened together in the form of a ship. Her life is gone, and she is a ship only in name.

A ship at the bottom of the ocean exists in specie so far as mere form is concerned; but the form avails nothing, for it can be put to no use.

When it is said that "the existence of the ship *in specie* in the hands of the owner will prevent an utter loss," we submit that this can only mean the existence of a ship *as a ship* with the capacity of being put in a condition to be practically used as a ship, and that it does not refer merely to the form of the wreck.

In defining the meaning of the exact phrase used in the bond now in question, viz., "an utter loss," under a bottomry bond, Mr. Justice Story refers to the opinion of Lord Mansfield, in Joyce *v.* Williamson, 3 Doug. 164, where he

says that the taking must be such "as would amount between insurer and insured to a total loss."

"By this language," he says, "his Lordship must be understood to mean, not a technical total loss, entitling the insured to abandon (for there can be no abandonment technically, so called, on a bottomry bond), but he meant a total loss in the sense that the ship is reduced to a state of total incapacity to perform the voyage, and cannot be repaired so as to perform it; or in other words, to use the phrase of foreign jurists, *that the ship is in a state of utter innavigability, such as arises from shipwreck or stranding, when the ship cannot be gotten off or repaired at all.*"

And he cites Thompson *v.* Royal Exch. Ass. Co., *supra*, in support of this view.

Pope *v.* Nickerson, 3 Story, 489.

And see "The Elephanta," 9 Eng. L. & E. 553, where the fact that the vessel sold for a considerable sum was not considered as in itself proof that the loss was not total.

The true distinction between a total loss under an insurance policy, and under a bottomry bond, we apprehend to be that pointed out in the earlier part of Lord Ellenborough's opinion, viz.: That in the former case a recovery may be had for a constructive total loss by making abandonment, while in the latter no abandonment can be made, and the loss must be an actually total one; but what constitutes an actual total loss we understand to be the same in both cases, except that in case of bottomry the expense of repairing is not to be taken into account.

It is evident that the expression, "total destruction" of a ship, does not mean the absolute annihilation of its materials, for in the case of sinking at sea these are all in existence.

The remains of the ship may be in existence and be of

considerable value as materials, and yet the loss be a total one.

This is clearly stated, in an early case, by the Supreme Court of Massachusetts: —

"In the technical sense of the words 'total loss,' and for any beneficial purpose in which a contract of insurance can be employed, a ship foundered or burnt at sea, or wrecked and broken upon the land, so as to be past relief or repair, is specifically, and as a vessel, totally destroyed, and such an event is a total loss, notwithstanding a salvage, and a very considerable salvage remaining."

Murray *v.* Hatch, 6 Mass. 475.

In the leading case of Cambridge *v.* Anderton, 2 B. & C. 691, Abbott, C. J., says: —

"If the subject matter of insurance remained a ship, it was not a total loss, but if it were reduced to a mere congeries of planks, the vessel was a mere wreck. The name which you may think fit to apply to it cannot alter the nature of the thing."

In the same case, Bailey, J., says: —

"I take the legal principle to be this: if by means of any of the perils insured against, the ship ceases to retain that character, and becomes a wreck, that is a total loss."

Lord Abinger says: —

"If in the course of the voyage the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound by the very terms of his contract to pay the whole sum insured."

Roux *v.* Salvador, 3 Bing. N. C. 286.

Arnould defines an actual total loss thus: —

"An absolute total loss takes place when the subject insured wholly perishes, or *its recovery is rendered irretrievably hopeless.*"

2 Arnould, Ins., Am. Ed., § 364, p. 990.

Again he says: —

"The great principle on which all the cases of absolute total loss depend appears to be this: the impossibility, owing to the perils insured against, of ever procuring the arrival of the thing insured according to the terms of the policy. If by reason of those perils operating on the subject insured, the assured is permanently and irretrievably deprived, not only of all present possession and control over it, but of all reasonable hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it, that is a case of absolute total loss; in such case there is no *spes recuperandi* at all; the loss is absolutely and of itself total, independently of the election of the assured to treat it as such."

Ibid. § 365, p. 1000.

And again he says: —

"If a ship in the course of the voyage be dismembered by perils of the sea, this is a clear case of total loss on ship; and it seems equally so where, *though the hull may still hold together, yet the ship, as a ship, is destroyed, and subsists only as a wreck.*"

Ibid. § 365, p. 1003.

Marshall uses similar language: —

"There is an absolute total loss on ship when, in the course of the voyage insured, she becomes, by the agency of the perils insured against, an utter wreck, — her planks and apparel scattered on the sea, although the fragments of them

may reach the shore, — or so circumstanced or damaged, *though still holding together in the form of a ship, that she has virtually ceased to be one*, and that an immediate sale of her where she lies has become necessary for the interest of those who are to sustain or make good the loss."

Marshall on Ins., 4th Ed., 446.

Parsons says: —

"If it be physically impossible to draw the vessel off, not in a theoretic, but in a practical point of view, or if she is so much injured by the wreck that she could not float, or be repaired, that would be an actual total loss."

2 Parsons, Mar. Ins. 73.

In a recent English case the rule is laid down still more broadly, and the reason stated by Mr. Justice Willes: —

"If a ship is so injured that it cannot sail without repairs and cannot be taken to a port at which the necessary repairs can be executed, that is an actual total loss; for *that has ceased to be a ship which never can be used for the purposes of a ship.*"

Barker *v.* Jansen, L. R., 3 C. P. 305.

See also, —

2 Phillips on Ins., § 1485.
Walker *v.* Protection Ins. Co., 29 Maine, 317–321.
Gardner *v.* Salvador, 1 Mood. & Rob. 116.
Irving *v.* Manning, 1 H. L. C. 287.
Mullett *v.* Shedden, 13 East, 304.

We submit that the condition of the "Frances" at the time of the sale brought her within the above definitions of an actual total loss.

She had been driven on shore by two successive gales, had a bad break amidships, in consequence of which she was

filled with water, and was entirely submerged at high tide. She was deemed irreparable, and the underwriters' agent had abandoned all hopes of getting her off. It is further to be noted that it was mid-winter, that the vessel had been ashore nearly two months, and that the place was the outside of Cape Cod, exposed to the surf from the open ocean; that she was badly broken and an iron ship.

As the vessel lay she was clearly valueless as a ship, even if otherwise capable of being repaired, unless she could be raised and floated. Whether she could be gotten off was not a matter of exact calculation like the expense of repairs, but a matter of opinion, and was at best but a possibility.

The underwriters' agent, acting for the benefit of all concerned, considered it impossible. The question is, Was he right?

He had been acting as the agent of the bondholders in his efforts to save the vessel and cargo.

See defendants' letter C, Record, p. 12.

And they should be concluded by his acts in this capacity, at least so far as to make his decision *prima facie* proof of the impossibility of saving the vessel.

In opposition to his opinion, the owners of the vessel were not bound to waste money for the purpose of showing that it was impossible to get the vessel off.

They had their choice between two things: either to do nothing, and allow the vessel to go to pieces where she lay, or to sell her materials while they were in a position to be recovered, and so save as much as possible from the wreck.

In the former case the bondholders might have endeavored to get the vessel off, and so save their bond; but with full knowledge of all the circumstances, and with an agent on the spot, they made no effort to do so, and acquiesced in the sale.

In the latter case the owners took the risk of the purchasers getting the vessel off, and so proving that at the time of sale the loss was not total.

The result proved that the owners' judgment was correct. The purchasers attempted to get the vessel off, but failed in the attempt, and she was left precisely as though no sale had been made, and eventually broke up and became a complete wreck.

It is immaterial that the purchasers entertained some unfounded hopes of saving the vessel. The state of the ship, not the acts of the parties, is what determines the fact of loss.

Cambridge *v.* Anderton, Ry. & Mood. 61.
Gardner *v.* Salvador, 1 Mood. & Rob. 116.

Nor is it material that the wreck had some intrinsic value at the time of sale.

Provided the ship is valueless as a ship, the recovery of salvage, even to a considerable amount, will not prevent the loss being total.

Murray *v.* Hatch, 6 Mass. 475.

The case is analogous to that of memorandum articles under a policy insuring such articles free from average except general.

In such cases the insured must show an actual total loss to entitle him to recover, and the rules for determining when a loss is total are the same as in other cases.

Poole *v.* Protection Ins. Co., 14 Conn. 47.

"The rule of law is now well settled that, under an insurance upon an article free from average, if by reason of the perils insured against it is placed in such a condition that in consequence of inevitable deterioration or decay it cannot be carried to the port of destination, but will necessarily, before

the completion of the voyage, be wholly destroyed, and it is accordingly sold at an intermediate port, this will constitute a total loss within the true intent and meaning of the memorandum clause."

Tudor *v.* N. E. Mut. Mar. Ins. Co., 12 Cush. 554.
Hugg *v.* Augusta Ins. Co., 7 How. 595.
Roux *v.* Salvador, 3 Bing. N. C. 266.
Poole *v.* Protection Ins. Co., 14 Conn. 47.
Dyson *v.* Rowcroft, 3 Bos. & Pul. 474.

So where, as in the present case, the vessel was, after her sale as a wreck, exposed to no new perils, and the natural and inevitable result of the causes then operating upon her was to complete her utter destruction, and it has been proved by experiment that she could not be released from the operation of those causes, we submit that her final utter destruction in connection with the testimony as to her previous condition and situation is conclusive proof that she was virtually at the time of sale "utterly lost."

Peele *v.* Suffolk Ins. Co., 7 Pick. 256.
Peele *v.* Merchants' Ins. Co., 3 Mason, 42.
Hall *v.* Franklin Ins. Co., 9 Pick. 484.
Crosby *v.* N. Y. Mut. Ins. Co., 5 Bosw. 369.
Stagg *v.* United Ins. Co., 3 Johns. Cas. 34.
Coit *v.* Smith, 3 Johns. Cas. 16.
Gardner *v.* Salvador, 1 Mood. & Rob. 116.

We know of no case where a bottomry bond has been enforced, where the vessel was not eventually saved, *as a ship*.

We submit, however, that the plaintiffs are entitled to recover, even if it be held that, at the time of sale, the vessel had not become a total loss, it being unquestionably the fact that she finally became such, before this action was brought.

In the latter case the owners took the risk of the purchasers getting the vessel off, and so proving that at the time of sale the loss was not total.

The result proved that the owners' judgment was correct. The purchasers attempted to get the vessel off, but failed in the attempt, and she was left precisely as though no sale had been made, and eventually broke up and became a complete wreck.

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We know of no case where a bottomry bond has been enforced, where the vessel was not eventually saved, *as a ship*.

We submit, however, that the plaintiffs are entitled to recover, even if it be held that, at the time of sale, the vessel had not become a total loss, it being unquestionably the fact that she finally became such, before this action was brought.

By the terms of the bond the money loaned was not payable until "three days after the safe arrival of the said vessel at Boston."

The vessel has never arrived at Boston.

This was an essential condition.

"The specification of perils, by which the vessel might be lost, does not effect the former part of the condition, and a substantial performance of the voyage by the vessel is necessary to enable the plaintiff (the bondholder) to recover upon this contract."

Appleton *v.* Crowninshield, 3 Mass. 443, 459.

If the vessel's failure to arrive were due to any fault or voluntary act or neglect of the owner, as by deviation, voluntary breaking up of the voyage, or failure to repair the vessel, she being capable of repair, we admit that he cannot take advantage of this breach of condition.

On the other hand, if the vessel fail to arrive without default on the part of the owner, by reason of perils of the seas, the bond is discharged.

See Pope *v.* Nickerson, 3 Story, 486.

"The Elephanta," 9 Eng. L. & E. 553; 15 Jur. 1185.

Appleton *v.* Crowninshield, 3 Mass. 443–459.

In the case at bar, the non-arrival of the ship was the immediate result of perils of the sea.

The sale made no change in her situation, and the abortive attempts of the purchasers to get her off only proved that the owners had been in no default for not making the same attempts themselves.

II.

THE BOND HAVING BECOME VOID BY THE UTTER LOSS OF THE VESSEL, THE BONDHOLDERS HAD NO RIGHT TO THE CARGO SAVED FROM THE WRECK.

(*a.*) It is doubtful whether a bondholder is in any case entitled to salvage properly so called.

"It is clear," says Lord Mansfield in Joyce *v.* Williams, "that by the law of England there is neither average nor salvage upon a bottomry bond."

2 Park on Ins. 7th ed. 628.
3 Dougl. 164.

This statement was cited and approved by Lord Kenyon in Walpole *v.* Ewer.

2 Park on Ins. 629.

Baron Park, in his work on insurance, also refers to this as a correct statement of the law, and adds, "His Lordship's opinion is confirmed by the Statute 19 Geo. II, c. 37, s. 5, which allows the benefit of salvage to lenders upon ships or goods going to the East Indies, clearly showing that there was no such thing at common law, otherwise there was no occasion to make such a provision."

2 Park on Ins. 628.

It is also adopted by Chitty in his notes to Blackstone's Commentaries.

2 Bl. Com. 455, *n.*

In this country it has been referred to as a settled rule of law by Chancellor Kent in Robertson *v.* United Insurance

Company, 2 Johns. Cas. 252; by the Supreme Court of Massachusetts in Appleton *v.* Crowninshield, 8 Mass. 340–361, and in Thorndike *v.* Stone, 11 Pick. 183; and by Prof. Parsons in his work on Marine Insurance, 1 Parsons, Mar. Ins. 221.

The rule has been questioned by some of the text writers.

Marshall criticizes Lord Mansfield's statement, that there is neither average nor salvage on bottomry contracts; but what he says relates principally to the matter of average, and in treating of salvage he states the rule as above given as the law on the subject.

Phillips, also, questions the rule, but no case is cited against it.

No decided case of which we are aware has ever expressly overruled the decision of Lord Mansfield in Joyce *v.* Williamson, and we believe that none has been decided in conflict with the principle there laid down.

The cases of "The Catherine," "The Elephanta," and "The Great Pacific" are referred to by the defendants as establishing a different doctrine.

None of these were cases of salvage.

In each of them the vessel existed in specie, capable of repairs, and was sold only because the owners were unwilling to incur the necessary expense of repairing.

On this ground it was decided in each case that no total loss had occurred, and that therefore the bond was still due.

In each case the fund in dispute was the proceeds of the sale of the damaged ship or goods, not totally lost within the meaning of the bond, and was not, properly speaking, "salvage," which is defined as "the part or remnant of the subject insured which survives the peril in *a total loss*."

2 Phillips, Ins., § 1488.

In the case of "The Catherine," 1 Eng. L. & E. 679, Dr. Lushington is reported to have said, "If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit." This has been cited as supporting the doctrine that the bondholder is entitled to salvage.

But this is said by the learned judge in expressing his approbation of Lord Ellenborough's statement, that "the bond cannot be lost so long as the vessel remained *in specie*"; and it does not appear from the context that he intended to lay down any broader rule, or to say that if the vessel ceased to exist in specie the bondholder would be entitled to the wreck.

This is still more evident on comparing this case with that of "The Elephanta" (9 Eng. L. & E. 553), decided shortly after by the same learned judge. In that case the bond covered ship, freight, and cargo. The vessel was seriously injured by sea perils, and the master sold her, claiming that she could not be repaired in the port where she then lay. A part of the cargo was transshipped and arrived in England. The bond was enforced against the cargo and the proceeds of the ship.

Now if, in Dr. Lushington's opinion, the bondholder was entitled to everything saved, whether the loss was total or not, proof of the bond and of the fact that part of the bottomried property was in existence would have been sufficient to support a judgment.

It is observable, on the contrary, that he nowhere intimates that the bondholder has such an extensive right, and deems it necessary to enter into a careful examination of the facts to determine whether the loss was *a total one*, finally resting his judgment on the fact that it was not proved that the vessel could not be repaired, and that therefore the loss was not total, and hesitating even to say that the mere

existence of the ship in specie was of itself sufficient to save the bond.

The opinion assumes throughout that where the loss is total, or the vessel ceases to exist in specie, the lien of the bondholder upon the property saved is utterly gone.

In the recent case of "The Great Pacific," L. R. 2 P. C. Ap. 516, the opinion of the Court states at the outset that it was an admitted fact that the loss was not a total one, and that something was due on the bond. The question before the Court was whether, under the peculiar terms of the bond, the bondholder was entitled to the entire property saved, or only to a portion. After referring to several of the cases above cited, the Court say: —

"The general rule undoubtedly is, that if the vessel is lost, the lender on bottomry, though his remedy is limited to the value of the property salved, is entitled to the whole of what is saved, provided it was included in his security. Therefore, that the bondholders are entitled to the whole of the proceeds of the sale of the vessel, *then existing as a vessel in specie*, unless there be some special provision in this particular contract which qualifies that right, is a proposition which, in their Lordships' opinion, does not admit of a reasonable doubt."

Here again, it is clear that the Court is speaking of the disposition of property to which it was admitted the bond still attached, because no utter loss of the vessel had taken place.

It is observable that in none of these cases is any reference made to the case of Joyce *v.* Williamson, although it was cited by every text writer as the only judicial statement of the law of England on the subject of salvage in bottomry.

We submit that comparison of these cases shows the law to be that where no actual total loss of the vessel has taken place, the bond still remains in force, even though it may be unprofitable for the owner to repair; and that in such case the bondholder is entitled to enforce his lien against any remnant of the ship or the proceeds thereof.

On the other hand, an actual total loss of the vessel, by the very terms of the bond, cancels the debt and satisfies the condition of the bond. The bond being gone, any salvage which may be secured belongs entirely to the original owner of the property.

Accordingly, when the bottomry lender desired to secure the right to salvage in case of utter loss, such right has been specifically mentioned in the bond.

See Bray *v.* Bates, 9 Met. 249.
Thorndike *v.* Stone, 11 Pick. 183.
Penn Ins. Co. *v.* Duval, 8 S. & R. 229.

(*b.*) It may be contended that the lender on bottomry has a right to salvage upon the ground that, as an insurer, he is entitled to the same rights as an ordinary underwriter on payment of a total loss.

This we may admit for the purposes of this case.

An underwriter has salvage only on the subject insured.

In the present case the *vessel* is the only subject insured. No risk is taken on the cargo, and the loan would be wholly payable even if the cargo were annihilated.

Granting that the defendants are entitled to hold the proceeds of the vessel, — which we do not dispute, — it does not follow either in principle or authority that they are entitled to salvage on the cargo on which they are in no sense of the term insurers.

This distinction is expressly recognized by Chief Justice Parker in Appleton *v.* Crowninshield, 3 Mass. 463.

"The lender has a claim upon the vessel or effects saved, upon whichsoever the risk was taken."

III.

BUT WHATEVER MAY BE THE RIGHTS OF THE BONDHOLDERS TO THE PROCEEDS OF THE SALE OF THE WRECKED VESSEL, IT IS CLEAR THAT, UNDER THE TERMS OF THE BOND IN QUESTION, HE HAS NO RIGHT TO THE CARGO OR ITS PROCEEDS.

The bond expressly provides that, if in the course of the said voyage an utter *loss of the said vessel* by casualties of the seas shall unavoidably happen, then *the said loan shall not be payable, and all parties liable therefor shall be wholly discharged*, and *the loss shall be wholly borne by the said lenders and bondholders*, and *everything herein contained for payment thereof shall be void.*"

It is to be observed that while the previous clauses of the bond hypothecated *vessel*, *freight* and *cargo*, this clause makes the obligation void on the "utter loss of said *vessel*."

Such a loss having taken place, we submit that, by the terms of the contract, the cargo is released from further liability.

The language cannot be satisfied by a construction that the *parties* liable are discharged, but that a lien remains upon the property.

Under our law the parties are never personally liable for the bottomry contract of the master, except to the extent of the bonded property in their hands.

"The Virgin," 8 Peters, 538.

The discharge of the parties, therefore, must mean a discharge from liability to account for so much of the bonded

property as may remain in their hands after "an utter loss of the vessel."

But not only are the parties discharged, but it is further provided that "said loan shall not be payable." The only ground on which the bondholders can claim the cargo is that a lien still attaches to it; but there can be no lien upon property for an unpayable loan.

Nor would the loss "be wholly borne by the said lenders and bondholders," "and everything therein contained for payment" — which necessarily includes the pledge of the goods — be void, if the cargo was to bear any portion of the loss, and a right to the proceeds of any portion of it saved remained by force of the contract.

The evident intention of the parties to this contract was that the cargo should become a collateral security for the payment of the loan to such an amount as the value of the vessel and freight after her arrival at her port of destination should fall short of said loan, but that if the vessel should be wrecked on the voyage and the lien on her be lost, the cargo should also be discharged.

The rights of the cargo owner are the same as though the cargo had been pledged by a separate instrument as collateral for the performance of the bond upon the vessel.

In such case it is settled that the avoidance of the bond by the loss of the vessel releases any collateral security.

The Hunter, 1 Ware, 249.
Thorndike *v.* Stone, 11 Pick. 183.
Bray *v.* Bates, 9 Metc. 237.
1 Parsons, Mar. Law, 420, and cases cited.

It has been suggested by the defendants that, as an ordinary respondentia bond is avoided only by the loss of the cargo, the same rule should apply to the cargo when it is bonded with the ship.

It is sufficient to reply that these are not the terms of the bond. The cargo was bonded for the benefit of the ship, and the bond is expressly declared to be void in case of the utter loss of the ship.

IV.

The meaning of the parties is, however, made plainer by the clause which immediately follows that above cited, which is introduced as *an exception*, and the *only exception* to the entire discharge of the property and voiding of the bond, if the vessel is lost by sea casualty, in this language: —

"Save and except only, and provided in such case, that the said lenders or bondholders shall be entitled to such average as can be hereby lawfully secured to them on all salvage, recoverable in respect to the said vessel, freight and goods, or any of them."

Put in more ordinary and less technical language, the whole clause provides this: That if the vessel is actually lost through unavoidable sea peril, the borrowers and the property shall be freed from the obligation, with the sole exception that the lenders shall have such right as the master has power to give them to any average that can be recovered on property saved.

It is unimportant here whether the master had or had not power to give the lenders that right to average on saved property which the owners might possess by the law maritime in the event of disaster, because it is not by virtue of any title to an average on the saved cargo that the defendants can or do now claim its whole proceeds.

And as there was no voluntary sacrifice by which the property was saved, there could be no average recoverable in respect to the cargo saved.

The language of this clause of the bond is not the most

certain and intelligible that might be devised, but it is not substantially different from that found in many forms of bottomry bond in use, and it is language which cannot be satisfied and reasonably and effectively interpreted unless we consider it to be designed to give to the bondholder the right to contribution in general average which the owners of the respective interests in the property pledged would have "if, in the course of said voyage," to escape from a sea peril, one or more of those interests should be voluntarily sacrificed for the benefit of one or more interests thereby preserved.

Average on salvage recoverable, that is, average recoverable on property saved, cannot mean a right to *all* the property saved.

The average referred to must be general average, or the right to contribution. It would be absurd to refer it to what is so commonly termed particular average, that is, partial loss.

The right of recovery for a partial loss rests not on maritime law, but on the express contract between owners and underwriters, to which the bottomry lender was no party, and the master could not transfer such right of the owner to the lender, thereby rendering that owner a compulsory insurer of his own property for the benefit of the borrower to the same extent he has sought to protect himself.

Had the master any such power, the perils of bottomry would be equal to the perils of the sea, and the owner, who cannot insure against bottomry, must incur a risk from casualties of the sea against which he could have no protection.

Partial loss "recoverable on salvage" has no meaning in the law of marine insurance.

Average is defined as "a term used in commerce to signify a contribution made by the owners of the ship, freight and

goods on board, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo; so as that the particular loser may not be a greater sufferer than the owners of the ship and the other owners of goods on board."

Marshall on Insurance, B. 1, Chap. 13, Sect. 7.

No doubt this language was inserted to give to the lender a right he would not have without it.

This is a case where there has been a total loss of the vessel. By the express stipulation of the bond there was, in that event, to be nothing due to the lender. The goods and freight, if any, saved belonged to the owners thereof, unless, by further stipulation, a right in the goods or freight saved, or both, is *expressly conferred* upon that lender. This well accounts for the insertion of a provision for contribution in general average such as we claim was conferred by the clause commented on.

Average may be spoken of as something recoverable. Contribution in general average may be recoverable as to salved property.

But all the property salved is nothing *recoverable*, and it certainly is not *average recoverable*.

This clause is utterly inconsistent with the defendants position, that the bondholder is entitled, in any event, to all the property saved.

By providing for an *average* on salvage, it implies that the salved property, subject to this average, belongs to some person other than the bondholder, and shows that, whatever may be the general law on this subject, the parties to this instrument contracted on the understanding that, without an express stipulation, the bondholder would not be entitled to

salvage at all, and that they intended that he should have, not the salvage itself, but the limited right of average in respect to it.

There is no hardship toward *the owner or the underwriter upon the cargo* in placing the lender in possession of the same rights to contribution *in general average* that the owners of the respective interests bonded would otherwise have, because those owners or underwriters would be bound to contribute, if the cargo were preserved by voluntary sacrifice, to somebody; and the same would be true as to contribution with regard to the vessel and freight owner and underwriters, if those interests were preserved at the expense of the cargo.

The only instance where language at all similar to this exception has been considered in a bottomry bond is the case of

Stephens *v.* Broomfield, L. R. 2 P. C. Ap. 524.

The bond in that case was upon the vessel only, and contained a provision, in case of the loss of the ship, for "such an average as by custom should have become due on the salvage."

As the vessel was found not to have been "utterly lost," but only constructively lost, it did not become necessary to determine its meaning, but the Court says, "Whatever it means, their Lordships believe that it was intended to secure the payment to the bondholders of something which the obligors might become entitled to receive from third parties in respect of the ship, and not a division of the proceeds of the sale of the vessel between the bondholders and the ship-owners. *It would meet the case suggested at the bar, in which the vessel having been voluntarily stranded with a view to the preservation of the cargo, general*

average upon the cargo saved might become due from the owners of that cargo to the owners of the ship. That such average would become due if the ship, failing to get off, is totally lost, seems to be a question upon which jurists are not agreed; but the clause may, nevertheless, have been designed to cover such average, if the right to it existed."

This is, substantially, the same interpretation we ask in this instance.

In this country the rule is that such voluntary stranding of the vessel would give the owner a right to call upon the cargo-owner for contribution.

Columbian Ins. Company *v.* Ashby, 13 Peters, 331.
Caze *v.* Reilly, 3 Wash. 298.
Gray *v.* Waln, 2 S. & R. 229.

And, although the bond in the present case covers cargo as well as ship, yet on the utter loss of the ship the bond would have become void as to the cargo; and it may well have been the intention of the parties that the bondholder should have all the rights of the vessel-owner to general average, without giving him any further claim on the property saved.

The discussion of the construction of the peculiar clause in question may be summed up thus: —

That clause must have been designed and used for one of three purposes: —

(1) To confirm to the bottomry holder his common-law right to salvage; (2) To add to his common-law right; (3) To limit or qualify it.

(1) Assuming the common-law right of the bottomry holder to be what the defendants assert it, viz., the right to

all salvage on ship, freight and cargo, the language of the clause in question is incapable of the construction that it confers or confirms that right.

The declaration that all salvage shall go to the lender would have been plainly and simply made to cover that intent; the phrase, that the "bondholders shall be entitled to . . . *average* . . . on all salvage recoverable in respect to the said vessel, freight and goods," cannot by possibility be so construed.

(2) Again, assuming the common-law right of the lender to be as the defendants assert it, viz., to all salvage on ship, cargo and freight, the clause cannot be intended to enlarge or add to the right, for it is incapable of enlargement or addition. The right to *all* salvage cannot be enlarged by providing for an average on salvage.

(3) The only sensible and effectual construction remaining is to treat it as creating an addition to the common-law right of the bottomry holder, as the plaintiffs assert that right to be, viz., the mere right to salvage of the ship itself. To this right the clause adds the right to average on the cargo, which might well be acquired in favor of the ship in case of voluntary sacrifice during the voyage, even though there was eventually a total loss.

(4) This construction is confirmed by reference to the early forms, where it will be found, as we believe, to have been first introduced into bonds which were strictly bottomry bonds, including ship and freight only, and not cargo.

See Abbott on Shipping, Appendix, Form III.

The intent and the effect of such a provision in such a form of bond would obviously be as contended by us.

(5) This is the construction, as above shown, given to

a like clause in the only case where such a clause has been the subject of judicial consideration.

"The Great Pacific," *supra*.

V.

We now ask the attention of the Court to the circumstances under which this bond was given, as they are presented by the agreed statement and are matters of judicial cognizance. They are properly explanatory of anything doubtful in the instrument, and they are strongly corroboratory of our interpretation.

The Court will remember that the power of the master to bond the cargo for the benefit of the vessel under any circumstances was one long contested, though finally established in the case of "The Gratitudine," 3 C. Robinson, 240, decided A. D. 1801.

This case has been frequently followed since, and the principle then laid down that he may do so *when the circumstances of the case justify him in hypothecating the cargo as the best means of accomplishing his contract for the safe conveyance of the property intrusted to his care*, has always been adhered to so far as we are aware.

If there is danger of the goods perishing in a foreign port, and the best means of forwarding them is to repair the vessel, and he must bond them to get the money, he may do so.

It is well settled that the vessel cannot be bonded for the benefit of the cargo, and this on the ground that she can get another cargo if she does not carry that one, and, therefore, the benefit to the vessel-owner is too slight to warrant her hypothecation on bottomry.

Fontaine *v.* Columbian Ins. Co., 9 Johns. 29.

"The Gratitudine," 3 C. Robinson, 261.

By parity of reasoning, if the cargo could be forwarded without difficulty or delay by another vessel, the benefit to the cargo-owner from the reparation of the vessel would be slight and remote, and hardly justify a master in its *unlimited* hypothecation.

The only benefit we can perceive in such a case is that transshipment might work to the prejudice of the insurance, if it were upon cargo on board a particular vessel. But it must not be forgotten, on the other hand, that the absolute and unlimited hypothecation of the cargo, so that it or its proceeds can be claimed by the lender, no matter what happens to the vessel, may compel the cargo-owner to yield up his whole cargo in discharge of the bond in a case where the vessel has been lost and the whole cargo saved, while he cannot make claim upon his underwriter, since no cargo has been lost by sea peril.

Moreover, the master who considers the insurance on the cargo must perceive that there is gross hardship toward the underwriter, who, by a policy prior in date to the bottomry, has acquired an inchoate right to the property saved from sea peril, which right would be perfected the moment an abandonment is made to and accepted by him, and then relate back to the moment of the disaster, in depriving him of all interest in the salved cargo for the benefit of the *respondentia* lender, *who is but a subsequent insurer on the same goods.*

Glover *v.* Black, 3 Burr. 1401.

The master of this vessel when she reached Singapore, subsequent to the first disaster, ceased to be the carrier of the goods, and became trustee for their owners, and bound to act for their interest.

"The Gratitudine," 3 C. Rob. 240.
Fontaine *v.* Columbian Ins. Co., 9 Johns. 29.
Searle *v.* Scovell, 4 Johns. Ch. 219.

The cargo was not of a specially perishable nature.

The port of Singapore is one of the great ports of the world, situated right in the highway of commerce, *via* British India to China, and vessels of all characters and of all nations enter and depart from it at all seasons.

The extent of the repairs made upon the vessel, as shown by the amount borrowed to effect them, renders it almost certain that the cargo must have been discharged to make them, and considerable delay must have arisen while they were made.

The agreed statement shows that the master was compelled to borrow the money to make the repairs, and to hypothecate the cargo in the manner and to the extent he did hypothecate it *in order to borrow the money*. But it does not appear he was compelled to repair the vessel *in order to convey the cargo to its destination*, or that there were any facts in the premises which would justify the placing of so severe an obligation upon it as the defendants contend was imposed.

In borrowing money for repairs the master acts as the agent of the ship-owner, in order to enable him to earn his freight.

Benson *v.* Duncan, 1 Exch. 537; 3 Exch. 644.

And he cannot bond the cargo for this purpose, except in addition to the ship and freight. Even if the ship be not specifically included in the security, it is held that "the cargo cannot be made subject to the payment of the bond until the proceeds of ship and freight have been exhausted. The ship is the primary fund, the cargo is secondary."

"The Bonaparte," 3 W. Rob. 302.

In the present case we may admit the master's right, under the circumstances, in giving the obligation we say he

did; that is, in making the cargo a guaranty for the repayment of the loan and interest *to such an amount as the value of the vessel after she reached the port of destination should fall short of that loan and interest.*

But we submit that he had no authority to give a bond which should make the cargo *primarily* liable in case the vessel should be utterly lost on the voyage, and therefore contribute nothing to the payment of the loan.

Upon our construction of the bond he has not done so.

We know of no case in which the bond has been enforced against the cargo under such circumstances.

Again, the rate of interest, 27½ per cent, is indicative that the lender insured against other and greater risks than those of the utter destruction and annihilation of both the vessel and her large and valuable cargo, through the perils enumerated.

Had he all the rights of an ordinary underwriter in respect to the property saved, and such ample security, why such a *pretium periculi?* Liberal compensation for the use of his money for four or five months and the cost of reinsurance would have been all he would be entitled to demand, and the master to pay.

In view of all these things we say that the interpretation of the bond we have above presented is the reasonable and natural one; and when they are considered in connection with its language, they tend strongly to confirm that interpretation as the proper one for the Court.

We admit that the words "average on salvage" are not wholly free from ambiguity; but the Court will observe that the words of the bond which make it absolutely void, by the total loss of the ship, are unmistakably clear, and any exception engrafted upon them should also be clear and precise, otherwise the plain language must prevail, and there is no room to doubt that there was an utter loss of the vessel by

unavoidable sea casualty during the voyage described in the bond.

We submit, then, that these defendants could not have recovered on this bond against the sugar, had it come to the hands of its owners, or maintained an action for money had and received against owners or underwriters had they sold it, and, therefore, that the money in the defendants' possession, proceeds of the saved sugar, was had and received to the plaintiffs' use.

WILLIAM G. RUSSELL,
CHARLES M. REED,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1877.

No. 275.

DELAWARE MUTUAL SAFETY INSURANCE COMPANY,

Plaintiff in Error,

v.

JOHN H. GOSSLER ET AL.

BRIEF FOR THE DEFENDANTS.

Supreme Court of the United States.

No. 275.

DELAWARE MUTUAL SAFETY INSURANCE COMPANY,

PLAINTIFF IN ERROR,

v.

JOHN H. GOSSLER ET AL.

BRIEF FOR THE DEFENDANTS.

FACTS.

In this case the German barque "Francis," her freight and cargo, were hypothecated by a bottomry bond, executed May 12th, 1872, at Singapore, in the British Dominions, to certain merchants of Singapore. She sailed from Singapore to Boston, and was cast ashore on Cape Cod; a large portion of her cargo was saved by the agents of the bondholders, and brought to Boston, but the sails, rigging, and some of the appurtenances of the vessel, were taken ashore, as usual when discharging under such circumstances in the winter season, as she might otherwise be top-heavy. After about half the cargo was discharged, she was advertised for sale by the underwriters; her sails, &c., which had been carried ashore, were sold in lots for $2323.70, on the 27th of January, 1873; the hull, with the lower masts and standing rigging, were sold on the 5th of February, 1873, for $2000, and the chains, anchors and other utensils on the same day, for $1494.75. Those who purchased the hull, immediately sold it for $5800 or $6000, and the new purchasers made an attempt to get

the vessel off, but, a storm coming up that night, were unsuccessful. In the summer of 1874, she had settled down very much into the sand, and was pretty badly broken up. Some little time after the sale of the vessel, the cargo was sold, with the consent of all parties, by the defendants, as agents of the bondholders (see Transcript of Record, Letters, pp. 12, 13), and the proceeds of a portion of it, viz., of the sugar, are now claimed by the underwriters on the cargo, who had paid the owners as for a total loss, while the defendants claim to retain these proceeds in behalf of the bondholders, and as their assignees.

For these facts reference must be had not only to the "Agreed Statement" but to the "Additional Stipulation," commencing at page 14 of the Transcript of the Record, as the latter adds to the former much which is very important.

The BOND hypothecates the vessel, cargo and unpaid freight, "by way of bottomry as security for the payment of the engagements hereinbefore specified," which are, *First*, That the vessel shall proceed and complete her voyage without deviation, &c. *Second*, That the debt and marine interest shall be paid in a certain manner within three days after the vessel's safe arrival in Boston, and before cargo is landed or freight collected. *Third*, That cargo shall not be landed or freight collected till said payment is made, and that the bondholders may prevent this. *Fourth*, That interest, at the current rate in Boston, shall be paid after failure of such payment.

After these "engagements" are stated, comes the clause by which it is agreed that in case of "*an utter loss of the said vessel*" by marine perils, &c., "the said loan and interest shall not be payable, and all parties liable therefor shall be

discharged therefrom, and the loss shall be wholly borne by the said lenders or bondholders; and everything herein contained for payment thereof shall be void and determined, save and except only and provided in such case that the said lenders or bondholders *shall be entitled to such average as can be lawfully secured to them, on all salvage recoverable in respect to the said vessel, freight and goods, or any of them.*"

Now as matter of fact the vessel did not arrive at her port of destination, but was constructively totally lost; it was sold as stated above; more than half of the cargo arrived and was landed there, and freight was paid, or is due upon it; and the agents of the bondholders, after paying the expenses of saving the cargo, &c., hold in their hands certain moneys, the proceeds of the cargo, subject to this payment of freight.

The QUESTION is, whether what has taken place has deprived the bondholders, according to the terms of their bond and the maritime law, by which that bond is governed and construed, of their lien upon the cargo and its proceeds.

Before investigating this question it may be observed that notwithstanding the terms of the bond, in England and America, and most, though not all, foreign countries, the borrowers on bottomry are not now personally bound except to the extent of the fund pledged, which has come into their hands. If the property pledged is delivered into their hands, they take it *cum onere*.

See the ship "Virgin," 8 Peters, 538–554, where Judge STORY, after stating the law as above and citing the authorities, adds, "To this extent indeed they" (*i.e.*, the borrowers) "may be said to be personally bound, for they cannot subtract the fund and refuse to apply it to discharge the debt."

Of course if the lenders hold the property pledged, or its

proceeds, it is liable to them to the extent of the amount due. If, as in this case, the property is not sufficient to pay the amount due, the lenders are entitled to the whole of it, provided always that the bond has not been rendered void by payment or in some other way.

The plaintiffs contend that the loan by the defendants' assignees is not payable, because there has been an utter loss of the vessel; and because in such case the bondholders are not entitled to any of the cargo pledged to them, which has been saved and has arrived at the port of destination.

The defendants deny each of these propositions; and in support of their view submit, —

I. That by the general maritime law, which the terms of this bond express, there was no *utter loss* of this vessel.

No doubt there was a total loss as well by the English as by the American law applicable to policies of insurance; but the law governing in insurance as to total losses is not applicable to bottomry bonds, as will be seen by reference to the following citations from eminent text writers and to the cases cited below: there must be an *utter* loss, just as this bond expressed it.

3 Kent, 12th ed. p. 359: "There is not in respect to the contract [of bottomry] any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on bottomry."

2 Arnould Ins., Perkins' ed. m. p. 1122, § 392 (4th ed. by Maclachlan, of 1872, p. 945), where, after stating that there is no constructive total loss in cases of bottomry, the author says, "If the ship exist in specie, though in a state which would warrant an insured on ship to abandon, as where the cost of repairs would greatly exceed her value when repaired, the assured on bottomry cannot recover, for the ship

must be absolutely and totally destroyed in order to discharge the borrowers."

1 Phillips Ins. 5th ed. p. 706, § 1170: "The property saved in case of wreck or other disaster continues to be subject to the hypothecation." . . . "Nothing short of a total loss will discharge the borrowers."

Abbott on Shipping, 11th ed. p. 126: "The consideration of these contracts" (bottomry and respondentia), "when made by the owners or part-owners themselves, does not properly belong to this place; their legality, and the risks which the lender is to incur, according to general rules, are very ably treated by Mr. Park and Mr. Sargeant Marshall, in their chapters on Bottomry and Respondentia. I shall only mention such circumstances relating to them as are connected with the subject of hypothecation by the master, premising, however, that a total loss, within the meaning of a bottomry bond, cannot happen if the ship exists in specie, although it may be so much injured by the voyage as not to be worth repairing and bringing to the ultimate place of destination so as to constitute a total loss within the meaning of a policy of insurance on the ship."

Maude & Pollock's Shipping, p. 440: "The loss of the ship, within the meaning of these contracts, is understood to be her actual destruction, or absolute loss to her owners. If she still exists, although in such a state of damage as to be constructively totally lost within the meaning of a policy of insurance, or if she is captured, and afterwards retaken and restored, she is not lost in the sense attached to that word in the contract of hypothecation."

Maclachlan's Shipping, p. 57: "The defeasance of the bond known to the maritime law of this country is the actual total loss of the vessel by sea perils while on her proper course in prosecution of the voyage described. The

doctrine of constructive total loss is not applicable to this contract."

"Hopkins' Hand-Book of Average," p. 93: . . . "In case the ship and her cargo be cast away and lost, the bond is to have no effect whatever, but is null and void. These last terms seem to mean the total loss of the hypothecated interests; because, if some wreck and part of the cargo of a vessel stranded or lost were saved, the holder of the bottomry bond would take possession, but would have to pay salvage expenses on them."

"Crump's Marine Insurance" (1875), p. 46, § 147: "An underwriter is liable on a policy on bottomry only in the event of an absolute total loss of the subject matter."

Thompson v. *Royal Exchange Mut. Ins. Co.*, 1 M. & S. 30 (1813). This was an action on a policy of insurance on bottomry; and the question was, whether there was "an utter loss within the meaning of the condition of the bottomry bond." The vessel on her voyage to London met with disasters, was towed into Falmouth, a survey was held, the expense of repairs found to amount to £3200, and that after their completion the vessel would be worth only £2000; the owners therefore determined to break her up and sell her. Her hull was sold for £300, her sails and stores for £400, her value at the commencement of the voyage having been £4000. Lord Ellenborough held, at nisi prius, that there was no utter loss, and directed a nonsuit. Mr. Gurney moved to set aside the nonsuit, contending that it should have been left to the jury with a direction to find a total loss, because the vessel was neither capable of continuing her voyage nor of remaining in existence as a ship, without incurring expenses greatly exceeding her value, and was of necessity broken up; but the rule was refused, the court saying that "in case of bottomry nothing short of a total destruction of

the ship will constitute an utter loss; if it exists in specie in the hands of the owner, it will prevent an utter loss."

"The Great Pacific," L.R. 2 A. & E. 381 (1869): In this case there was a bottomry bond on ship and freight. The ship on her voyage to Great Britain sustained damage and was compelled to put into Valparaiso; there she was surveyed, found not worth repairing, and was sold by the master. The petition was brought in the admiralty court by the bondholders against the proceeds of the vessel then in court, and a mortgagee of the ship intervened as claimant. Sir R. PHILLIMORE says: . . . "The defendant contends in these circumstances, first, that nothing is due on the bottomry bond in question; secondly, that at all events the plaintiffs are only entitled to an average on the sum of £3628. 8s., the amount of the proceeds of the sale of the ship paid into court. The questions which the court has to decide are, whether by either or both of these averments a valid defence is set up against the holder of the bottomry bond, who claims to be paid the full amount of his loan.

"I will assume that in this case there was what is called a constructive total loss of the ship, which would have entitled her owners to recover from the underwriters the whole amount of her insurance, but there has not been that *actual or absolute total loss* which would discharge from his liability the borrower of money upon bottomry, inasmuch as the ship existed *in specie* at the time of her sale."

"The Great Pacific," L.R. 2 P.C. 516 (1869), an appeal of the same case, dismissed with costs.

It was heard before Lord Romilly, Sir William Erle, Sir James W. Colville and Sir Joseph Napier. Sir JAMES W. COLVILLE delivered the opinion, and, after referring to the words of the bond, substantially the same as the one under consideration, except that ours uses the words "utter loss"

instead of "loss" (page 11 of Transcript of Record), and to the two defences above stated said, "It is obvious that if either defence is to prevail, the constructive total loss involved in the sale of the vessel at Valparaiso must be treated as a 'loss' within the meaning of that stipulation in the condition of the bond upon which the defence is founded. It was admitted at the bar, and could not have been disputed with effect, that the vessel cannot be said, by reason of what occurred at Valparaiso, to have been utterly lost, cast away or destroyed; and consequently, that the appeal cannot be supported in so far as it impugns so much of the learned judge's order as rejected the averment that nothing was due upon the bond. Therefore, the only question now to be decided is, whether, in the true construction of the words 'in case of loss of the ship or vessel such an average as, by custom, shall have become due on the salvage,' and, upon the admitted facts of the case, the respondents are entitled, not to the whole, but to some undefined portion of the sum in court. The general law is succinctly stated in Kent's Commentaries, vol. 3, § 369 (should be m. p. 359), p. 454, 11th ed. Speaking of a loan on bottomry, he says, "There is not, in respect to the contract, any constructive total loss. Nothing but an annihilation of the subject hypothecated will discharge the borrower on bottomry. The property saved, whatever it may be in amount, continues subject to the hypothecation." Sir JAMES W. COLVILLE then stated the modern authorities in favor of the doctrine, &c., referred to the fact that the first ground of appeal had been abandoned, and discussed the meaning of the clause "with regard to the salvage on average," suggested that it was intended to secure to the bondholders something which the obligees in the bond might be entitled to receive from third parties; as, for instance, where there was a case

of voluntary standing; and concluded thus: "Their lordships, however, think that they are not called upon to determine upon what particular subject the claim might operate, because it can have no operation in the present case unless there has been a *loss* of the vessel within the meaning of it."

Bromfield v. *Stephens*, L.R. 5 Ex. 192, was an action on a policy of insurance on this same bottomry bond; and it was held that the defendants were not liable, because there was no loss of the bond; MARTIN, B., saying, "The question is, has this bond been lost by reason of the loss of the ship? Now it has been held that, in construing a bottomry bond, loss means a loss by going to the bottom of the sea; but what the second count alleges is only a constructive total loss." And CLEASBY, Baron, cites with approbation the words already quoted from Arnould on Insurance, that the ship must be absolutely and totally destroyed in order to discharge the borrower.

Insurance Co. of Philadelphia v. *Duval et al.*, 8 S. & R. 138, 148 (1822). Action of debt upon a respondentia bond by the lenders. The ship on her voyage from Calcutta put into Port Royal for repairs, and was condemned because it was found that the repairs would cost more than she was worth. The goods came into the hands of the bondholders and were sold, and they sued for the balance under the provisions of an agreement accompanying the bond, that the borrowers should be personally liable in certain events. The defendants contended that they were not liable, amongst other reasons, because there was an utter loss of the vessel; but C.J. GIBSON said that "a ship is not utterly lost while she remains in specie in the hands of her owners. Had she been taken by an enemy she would have been utterly lost to the owner; so had she been burnt, or wrecked and gone to pieces. But she is not utterly lost because it may cost more

than she is worth to repair her." . . . "Nothing short of a total destruction of the ship will constitute an utter loss."

So in *Delaware Ins. Co.* v. *Archer*, 8 Rawle, 216–226, C.J. GIBSON says, *arguendo*, "It seems to be held, both by the English and American courts, that the lender takes the risk only of a total loss; but that any part of the property which arrives goes to the lender without regard to whether it be great, or whether it be small, so that it does not exceed in value the amount of the loan, has never, I believe, been doubted anywhere."

Furthermore, if the bark had been so wrecked as to have continued no longer a vessel at the time of sale, the property saved would have remained subject to the sale; for

The property saved in case of bottomry, whatever it may be in amount, continues subject to the hypothecation.

Besides cases already cited, see—

3 Kent, 12th ed. 359, 360: "By the general marine law the lender on bottomry is entitled to be paid out of the effects saved, as far as those effects go, if the voyage be disastrous." And see authorities cited in note.

The "Catharine," 15 Jurist, 232, where Dr. LUSHINGTON says, "If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit."

Bynkershoek Quæst. Pub. lib. 3, ch. 16.

That the same principle applies to whatever is the subject

of hypothecation, if any of the materials of the ship are saved. See the case of the

"Elephanta," 15 Jurist, 1185, cited hereafter.

In the present case the barque existed in specie as a vessel at the time of sale. Her hull lay on the beach, injured, no doubt, and in a place of great danger; all her sails, rigging, anchors, chains and other appurtenances remained; the sails and part of the rigging had been carried ashore, probably, to prevent her becoming top-heavy as she discharged her cargo, or at any rate as they would have been carried if she had remained uninjured, and there had been a certainty of getting her afloat. Everything was sold; the hull and lower masts and standing rigging were sold as one thing for $2000, and immediately afterwards resold by the purchasers for $5800 or $6000. Both sets of purchasers evidently intended to try to get her off, and had good hopes of doing so. The latter actually tried, but a new misfortune, of the same kind as that which cast her ashore originally, prevented her being got off (Transcript of Record, pp. 15 and 16); but there was in no sense an *utter* loss of her, a total destruction.

It must be remembered that before she ceased to exist as a vessel, she was sold (Transcript of Record, p. 15), and the purchasers again sold her, still existing as a vessel, and there were still expectations on the part of some persons, at least, of getting her afloat.

What has happened to her since is of no consequence. Suppose the new misfortune had not happened and she had been got off, she would then have continued to exist as a vessel, and might have been carrying cargo till this day: but the decision of this case cannot be affected by anything which took place after the sale. How can her existence as a vessel

at the time of the sale be dependent upon her loss within twenty-four hours any more than if it had been within twenty-four weeks or months, especially when that loss was apparently caused or may have been caused by "the very heavy flood" that came on the night of the commencement of the attempt, by the second purchaser, to get her off? To be sure she was in a dangerous position on the beach, but so in a much less degree, no doubt, is a vessel at sea, especially when approaching the land in a storm, but she is none the less a vessel.

It is not necessary for us to claim that as long as any part of the vessel was saved, there was no utter loss, but the authorities already cited sustain that position, and declare that in such a case the bondholders are entitled to what remains.

The question here is, whether the bondholders are entitled to retain the proceeds of the cargo; but no distinction can be made between vessel and cargo, for both are hypothecated by the same instrument, and are by that instrument subject to the same provision in regard to the utter loss of the vessel. The case of *Insurance Co.* v. *Duval et al.*, S. & R., already cited, was a case of respondentia bond upon the cargo, dependent upon the safe arrival of the ship; and the same doctrine was applied in that case as in case of pure bottomry bonds.

See also "The Elephanta," 15 Jurist, 1158, a case of bottomry on ship, cargo and freight, where the ship was abandoned as for a total loss. Dr. LUSHINGTON, in concluding his opinion, said, "I must, therefore, pronounce in favor of the bond, and enforce it. I must do so, because, if the ship could be repaired, the case clearly falls within the rule laid down by Lord Ellenborough, — and I think it is not proved that she might not have been repaired; and because, if I am

wrong as to the question of fact, the case would still fall within the still more extended construction which might be put on Lord Ellenborough's judgment; namely, the existence in specie, though I do not rely upon the last ground. It is my duty, therefore, to enforce the bond against the proceeds of the ship, the sugar sold at Algoa Bay, and the sugar brought home. I can find no sufficient reason for drawing any distinction between the liability of the one and of the other."

If it be argued that by the terms of the bond the debt is to be paid within three days after her safe arrival in Boston, and that she never arrived, it is a sufficient answer to say that a similar provision exists in all bottomry bonds, and that in case of a mere technical total loss the vessel may not arrive, but yet the debt is due to the amount of the value of what remains. Dante, 2 Wm. Rob. 427.

Besides, although it is provided that the debt shall be paid within three days after her safe arrival, it is also provided that the cargo shall not be landed or the freight collected till such payment has been made, and here the cargo, or a large part of it, has been landed; and therefore the debt is due to the extent of the property saved.

But this point was discussed and decided in favor of our position in the case of the Great Pacific, by the admiralty judge. It did not seem of sufficient importance to be argued before the Privy Council on appeal.

II. In this case the words of the bond are, as we have seen, stronger than in all or most of the cases cited. As if to prevent any question arising upon the meaning of the word "loss," which has been construed, as we have seen, in all cases but those of bottomry bonds, to mean a constructive total loss, the present bond used the words "utter loss,"—words as strong as could be found to express utter destruc-

tion and annihilation, and the very words which Sir James W. Colville has used (p. 523) for that purpose. "It does not," he says, "follow that because the words 'the loss of the vessel' mean something short of utter loss and destruction, they include a constructive total loss, which, as has already been shown, they would not include upon the construction of ordinary bottomry bonds."

III. But even if there had been an utter loss of the vessel, the bondholder would be entitled to the proceeds of the cargo in this case under the clause of the bond providing that, in case of utter loss, the bondholder "shall be entitled to such average as can be lawfully secured to them on all salvage recoverable in respect to said vessel, freight and goods, or any of them."

Salvage, in this clause, evidently means the property saved. What, then, is the average which may be lawfully secured to the bondholder on the property saved?

The expression is probably inaccurate, like many used in instruments the forms of which have come down from early days, — it is certainly obscure; but the meaning suggested by Sir James W. Colville in the "Great Pacific," heretofore referred to, at pages 523 and 524, seems the correct one. After stating that the vessel may be wrecked so as to be a mere congeries of planks, and yet that there may be a salvage of some materials, and quoting Dr. Lushington's statement, that the bottomry bond attached to the last plank, he says, "The clause under consideration may have been intended to secure that right" (that is, the right to the salvage of the hypothecated property), "by making it a condition for the avoidance of the bond that the obligors should account for such salvage; and he then referred to the fact that the clause was not a special one, but was to be found in

the form of bottomry bond given in the appendix to Abbott on Shipping.

And Sir ROBERT PHILLIMORE, when the same case was before him, said (p. 385), "It appears, upon an examination of the old form of bonds, copies of which are to be found in the early editions of Abbott on Shipping, and in the work of Weskett, . . . that a stipulation couched in these very words was of common occurrence, derived probably from the mercantile usages of Spain with respect to vessels trading with the Spanish West Indies; and that it referred to cases in which the ship was so wrecked that portions of her alone remained, such as spars, planks, rigging, and the like. . . . This provision in regard to salvage in cases of bottomry, it may be observed, is to be found in the French code of commerce, Art. 327: '*En cas de naufrage, le paiement des sommes empruntées à la grosse est reduit à la valeur des effets sauvés et affectés au contrat, deduction faite des frais de sauvetage.*' It is not necessary that I should express an opinion whether, on the contingency of such a wreck, the lender would or would not be entitled to this kind of salvage by the common law merchant, or whether, in order that he should have this right, the insertion of these words was necessary." He then decides the case as before stated, on the ground that there was no utter loss.

In the case of the "Great Pacific," the bond was upon the ship only, and the salvage to which the bondholder would be entitled was from the ship only. In our case the ship and cargo are both hypothecated, and the bondholder, in case of an utter loss of the vessel, would have been entitled, under the terms of his bond, not only to the property saved from the ship, but to that saved from the goods; salvage from the ship or goods, "or any of them."

The learned Judge of the Circuit Court said very truly,

that if this was the meaning of the clause, it could have been simply expressed in language free from ambiguity. But whatever meaning we give to the clause, the same argument applies; that meaning might have been expressed in language free from ambiguity, in language which would not have troubled the judges of the admiralty court and of the privy council to define the meaning of. Probably, however, when the clause was first introduced, the term "average" was not so obscure as it now appears to be, from our habit of applying it in insurance matters in a special sense to a general average loss, or a partial loss.

If we give the more general meaning, either of contribution or proportion, each of which is given by dictionaries, the clause would plainly enough state that the bondholder should be entitled to such contribution or proportion out of the property saved as would pay his bond.

IV. The underwriters on the cargo cannot stand any better than the owners. The abandonment was made to them on the last days of December, and in March succeeding they paid a total loss, and received an assignment of the owners' rights, but they were only subrogated to those rights whatever those rights were.

V. If none of the above views satisfy the mind of the Court as decisive in the defendant's favor, there is another perhaps worth suggesting. Park, in his work on Insurance, defining bottomry and respondentia, after stating that one is a loan on

the ship, the other on the goods, adds, "In a loan upon bottomry, the lender runs no risk, though the goods should be lost; and upon respondentia the lender must be paid his principal and interest though the ship perish, provided the goods are safe." This definition and distinction are followed by other later writers. Now this was a bond upon both ship and cargo, a bottomry and respondentia bond united. May the two subjects of hypothecation be divided and each be governed by its own law merchant? If they can, the goods or a part of them having arrived safe, the bond is good to the extent of those which have thus arrived.

If it be said that this contradicts the words of that part of the bond which provides in case of an utter loss of the vessel that the loan shall not be payable, it may fairly be answered that the bond is a clumsily drawn instrument, and all its parts are to be taken together; and it is also provided in it that the cargo shall not be landed till the payment is made; now the whole bond may be made consistent, "*reddendo singula singulis*," *i.e.*, applying to the vessel what relates to the vessel, to the cargo what relates to the cargo. If the vessel does not arrive, but is utterly lost, whatever that means, then the claim on her is gone; if the cargo arrives, the claim against it exists.

This suggestion is not supported by any authority, and as the authorities are so decisive that there was here no total loss of the vessel, as that term is used when applied to bottomry bonds, and especially no utter loss as expressed in this bond, the Court will not probably find it worth considering.

SOHIER & WELCH,
for Defendants.